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No._____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1986

JAMES W. KERR, JR., PETITIONER

V.

EL PASO TIMES, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

Jerry A. Gibson*
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201
(512) 734-7092

Carrie K. Catalani
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201
(512) 734-7092

ATTORNEYS FOR PETITIONERS
*Counsel of Record

QUESTION PRESENTED

Whether a newspaper article statement which falsely and maliciously accused Petitioner, James W. Kerr, Jr., an Assistant United States Attorney, of cheating in the prosecution of a drug smuggling case was an actionable statement of fact or was a protected expression of opinion.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, JAMES W. KERR, JR., and the Respondents, EL PASO TIMES, INC.

The former Defendant parties who are no longer named to the litigation are Gannett Company, Inc., Ron Dusek, E. Robert Bentley, Barclay Jameson and Frank Feuille, III.

TABLE OF CONTENTS

QUESTION PRESENTED 1

LIST OF PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 12

I. A Definitive Standard For Distinguishing An Actionable Statement Of Fact From A Protected Expression Of Opinion Does Not Exist . . . 12

II. Even If This Court Adopts The Ollman Standard, It Was Misapplied In The Current Case And Should Be Clarified By The Supreme Court Which Created The Distinction Between Fact And Opinion 24

III. The Supreme Court Should Delineate When A Statement Of

Opinion Is Not Constitutionally Protected Speech And Establish Guidelines For Application Of The Exception 37

CONCULSION 42

APPENDIX

A. Opinion Of The Court Of Appeals 1a

B. Jury Findings From The District Court 19a

C. Judgment Of The District Court 35a

D. Order Granting New Trial Subject To Plaintiff's Filing Of Remittitur 39a

E. Judgment Of The Court Of Appeals 42a

F. Court Of Appeals Order On Appellee's Motion For Rehearing 45a

G. Refusal Of Writ Of Error From The Supreme Court Of Texas . 47a

H. Refusal Of Motion For Rehearing On The Writ Of Error For The Supreme Court Of Texas . . . 47a

J. Newspaper Article Published By Respondent 51a

TABLE OF AUTHORITIES

Buckley v. Littell, 539 F. 2d 882 (2d cir. 1976) cert. denied, 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed. 2d 777 (1977) 29,30

Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983) .27,32

Cianci v. New York Times Publishing Co., 639 F.2d 54 (2d cir. 1980) 30,33,39

El Paso Times, Inc. v. Kerr, 706 S.W. 2d 797 (Tex.App.- El Paso 1986, writ ref'd n.r.e.) . .8,9.10,11 25,26,32,38

Frank B. Hall & Co., Inc., v. Buck, 678 S.W. 2d 612 (Tex.App.- Houston [14th District] 1984, writ ref'd n.r.e.), cert. denied, __ U.S. __, 105 S.Ct. 2704, __ L.Ed. 2d __ (1985) 31

Gertz v. Robert Welch, Inc.,

418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974) 12,13

Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed. 2d 789 (1974) 16

Hotchner v. Castillo-Puche, 551 F. 2d 910 (2d cir. 1977), cert. denied, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed. 2d 95 (1977) . 39

In re Yagman, 796 F. 2d 1165 (9th cir. 1986) 13,21

Information Control Group v. Genesis One Computer Corp., 611 F. 2d 781 (9th Cir. 1980) . . . 16,21

Janklow v. Newsweek, 788 F. 2d 1300 (8th cir. 1986) 13,21,35

Keller v. Miami Herald Publishing Co., 788 F. 2d 711 (11th cir. 1985) 21

Lauderback v. American Broadcasting Co., 741 F. 2d

193 (8th cir. 1984) cert. denied, 469 U.S. 1190, 105 S.Ct. 961, 83 L.Ed. 2d 967 (1985) 38

Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F. 2d 219 (2d cir. 1985) 13,14,20 39

Myers v. Boston Magazine Co., Inc., 403 N.E. 2d 376 (Mass. 1980) 36

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) 8

Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed. 2d 745 (1974) 15,16,35

Ollman v. Evans, 750 F. 2d 970 (D.C. cir. 1984), cert. denied, __ U.S. __, 105 S.Ct. 2662, 86

L.Ed. 2d 278 (1985) 9,14,18
. 19,24,26,27
. 28,32,34,39
Rinaldi v. Holt, Reinhart and Winston, Inc., 366 N.E. 2d 1299 (N.Y.App.- 1977), cert. denied, 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed. 2d 456 (1977) 27,30
Shiver v. Apalachee Publishing Co., 425 So. 2d 1173 (Fla.Dist.Ct.App.-1983) 16
Woods v. Evansville Press Co., 791 F. 2d 480 (7th cir. 1986) . . . 20
U.S. CONST. amend. I 3,7
U.S. CONST. amend. XIV, §1 3,7

MISCELLANEOUS

WEBNER, THE FACT/OPINION DISTINCTION IN FIRST AMENDMENT LIBEL LAW: THE NEED FOR A BRIGHT LINE RULE, 72 The

Georgetown Law Review 1817
(1984) 23

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

The Petitioner, JAMES W. KERR, JR., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth District of Texas, entered in the above-entitled proceeding on March 26th, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas is reported at 706 S.W. 2d 797. It is also reprinted in Appendix A attached hereto, p.1a, infra.

The judgment of the 65th Judicial District Court of Texas has not been reported. It is reprinted in Appendix C attached hereto, p. 35a, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26th, 1986 (App.A, p. 1a, infra). The Court of Appeals refused Petitioner's Motion for Rehearing on April 16th, 1986 (App.F, p. 44a, infra).

Petitioner applied to the Texas Supreme Court on writ of error but the writ was denied on July 16th, 1986 (App. G, p. 45a, infra). The Supreme Court of

Texas denied Petitioner's Motion for Rehearing on the writ of error on October 22nd, 1986 (App. H, p. 47a, infra).

Jurisdiction of this court to review the Judgment of the Court of Appeals in the Eighth District of Texas is invoked under 28 U.S.C.A. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I.

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. XIV, §1.

All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, JAMES W. KERR, JR., was an assistant United States Attorney for the Western District of Texas in 1978. During the summer of 1978, Petitioner successfully prosecuted the trial United States of America vs. Rick de la Torre & Ben Garcia, a drug conspiracy case. Ronald Dusek, an employee of Respondent, EL PASO TIMES, INC., wrote daily news

articles on the trial for the El Paso Times Newspaper. (SF 41-42, 44-55, 129-134). On Sunday, August 6, 1978, 3 days after the de la Torre trial had concluded, Respondent published an article written by Dusek entitled "Federal System Less Than Just?". (App. J, p. 49a, infra). (SF 39-40). The article contained Dusek's accusations that "Kerr lied" and "cheat[ed]" in his prosecution of the de la Torre trial. (App. J, p. 54a, and 56a, infra). (SF 63-69, 75-91, 111-117). Dusek testified that these assertions regarding Petitioner, plus other incidents referred to in the article were the basis of his opinion that the federal system in El Paso was less than just. (SF 67, 110, 158, 237).

Petitioner brought a libel action against Respondent based on the false, defamatory and libelous statements in

Dusek's article. (Tr. 50-53). Part of Respondent's defense was that because the article appeared in the Opinion/ Commentary section of the EL PASO TIMES Sunday paper, it was an expression of opinion which was protected by the 1st and 14th Amendments to the United States Constitution. (SF 125-129). (Tr. 55).

The jury in the 65th Judicial District Court in Texas found that the "lying" accusation was false but was not made with actual malice. (App. B, p. 27a-28a, infra). (Tr. 103-104). In contrast, the jury found that the accusation of "cheating" was false, was defamatory but was also published with actual malice. (App. B, p. 28a-30a, infra). (Tr. 105-107). Based on the finding of actual malice regarding the "cheating" accusation, the jury awarded Petitioner $500,000.00 in actual damages and $3,000,000.00 in punitive damages.

(App. B, p. 31a-32a, infra). (Tr. 108-109).

The Court of 65th Judicial District of Texas accepted the jury's findings and held that "the evidence satisfies the requirements of the 1st and 14th Amendment of the United States Constitution ... and that the statement in question is actionable." (App. C, p. 36a, infra). (Tr. 137-138).

Subsequently, the District Court granted Respondent a motion for new trial subject to Petitioner's filing of a remittitur of $2,900,000.00. (App. D, p. 39a-41a, infra). (Tr. 185-186). The Court reasoned that the "damages were excessive in light of the evidence introduced at trial". (App. D, p. 40a, infra). (Tr. 185). Petitioner filed his remittitur of damages the following week. (Tr. 187).

Respondent sought review of the

District Court decision in the Court of Appeals for the Eighth District of Texas. (Tr. 189-190). The Court of Appeals reversed the District Court Judgment and ordered that Petitioner recover nothing from Respondent. (App. E, p. 42a-43a, infra). The Court of Appeals recognized in its opinion that the statement that "Kerr lied" was protected under the 1st and 14th Amendment of the U.S. Constitution because it was not made with actual malice as required when a public official is involved according to New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686, (1964). See El Paso Times, Inc. v. Kerr, 706 S.W. 2d 797, 798 (Tex.App. - El Paso 1986, writ ref'd n.r.e.) (App. A, p. 4a, infra). The "cheating" accusation however, was made with actual malice. Thus, the court had to decide whether the statment was an

assertion of fact or opinion in order to determine if the "cheating" statement was also protected speech under the Constitution. See id. at 798. (App. A, p. 5a, infra).

The Court of Appeals applied the four factor test utilized in Ollman v. Evans, 750 F. 2d 970 (D.C.Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 2662, 86 L.Ed. 2d 278 (1985) to determine if the statement was fact or opinion. See id. at 798. (App. A, p. 5a-6a, infra). The four factors are:

1. The common usage or meaning of the language.

2. The statements verifiability.

3. The surrounding context of the statement.

4. The broad context of the statements surroundings. (App. A, p. 5a-6a, infra).

The Court of Appeals determined that

the "cheating" accusation was an assertion of opinion because public usage of the word cheating had no distinct definition which would infer that Dusek "had undisclosed facts to back up his statement". See id. at 799. (App. A, p. 7a-8a, infra). The Court reasoned that the "cheating" statement could not be verified because "in the case at bar, the word 'cheating' was used in a way that denotes opinion." See id. at 799. (App. A, p. 10a, infra). The Court of Appeals found additionally that the context of Dusek's article as a whole evidenced that it was opinion since it was "laced with language that is typically used as opinion". See id. at 800. (App. A, p. 15a, infra). Furthermore, the fact that the article appeared in the Editorial section and that the title was framed in a question led the Court of Appeals to hold that the broader context of the

article showed it to be opinion rather than fact. See id. at 800. (App. A, p. 16a, infra). Under the Ollman test, the Court of Appeals ruled that the "cheating" accusation was a nonactionable statement of opinion. See id. at 800-801. (App. A, p. 17a-18a, infra).

Petitioner timely filed a Motion for Rehearing with the Court of Appeals, but the Motion was overruled. (App. F, p. 44a, infra).

The Petitioner filed a Writ of Error on the case with the Supreme Court of Texas. However, the Writ was refused with the notation that there was no reversible error in the Court of Appeals opinion. (App. G, p. 45a, infra). The Supreme Court of Texas also overruled Petitioner's Motion for Rehearing on the application for Writ of Error. (App. H, p. 47a, infra).

REASONS FOR GRANTING THE WRIT

I.

A Definitive Standard For Distinguishing An Actionable Statement Of Fact From A Protected Expression Of Opinion Does Not Exist.

The emergence of the "opinion privilege" as a matter of First Amendment law in libel cases is of fairly recent origin. The Supreme Court first recognized the different constitutional protections afforded to statements of fact and to statements of opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974). In dicta, the Supreme Court stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of the judges

> and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. at 339-40, 94 S.Ct. at 3007, 41 L.Ed. 2d at 805.

The next twelve years have seen the traditionally state regulated law of defamation become increasingly dominated by the Federal Courts and the First Amendment. Virtually all of the Federal Circuits have adopted the dicta in Gertz as a Constitutional First Amendment Doctrine. In developing the doctrine, courts have recognized that determining whether a statement is fact or opinion is a question of law for the court to decide. See e.g. In re Yagman, 796 F. 2d 1165, 1172 (9th cir. 1986); Janklow v. Newsweek, 788 F. 2d 1300, 1305 fn. 7 (8th cir. 1986); Mr. Chow of New York v. Ste.

Jour Azur S.A., 759 F. 2d 219, 224 (2d cir. 1985); Ollman v. Evans, 750 F. 2d at 978. However, there is no universal test for courts to follow in deciding this question of law.

Although the Supreme Court's opinion in Gertz made the initial distinction between fact and opinion, it did not include a standard for lower courts to follow in delineating the different Constitutional protections. The result has been a plethora of inconsistent, confusing and unsuccessful attempts by the courts to apply this so called privilege and establish some guidelines for judges, lawyers and the media in determining what is actionable and what is not.

The Texas Court of Appeals, in the current case, applied the four factor test in Ollman v. Evans as if it were the definitive standard for

distinguishing fact from opinion. 750 F. 2d 970 (D.C. cir. 1984), cert. denied, __ U.S. ___,105 S.Ct. 2662, 86 L.Ed. 2d 278 (1985) (App. A, p. 5a-6a, infra). It is questionable, however, whether the Ollman test is the culmination of the developing fact vs. opinion doctrine. Petitioner asserts that the current case, in which the jury found that the "cheating" accusation was false, defamatory and published with actual malice, is the appropriate opportunity for the Supreme Court to speak in this realm.

The scant guildelines provided by the Supreme Court up to this point allude to such criteria as the specific language used and the broader context of the article to determine what the reader understood. See Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 94 S.

Ct. 2770, 41 L. Ed.2d 745 (1974) (because of the loose, figurative sense of the language and the fact that it took place within a labor dispute, alleged libel was determined to constitutionally protected opinion); Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970) (statement was not actionable libel because it was a critical characterization which was merely "rhetorical hyperbole").

Prior to the Ollman v. Evans decision, lower Courts have varied widely in their attempts to develop the fact/opinion theory. Compare Shiver v. Apalachee Publishing Company, 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983) (court's determination of fact from opinion is a judgment call) with Information Control Group v. Genesis One Computer Corp., 611 F. 2d 781, 783-84 (9th cir. 1980) (court

used three factors to distinguish opinion from fact: (1) context of the statement, (2) surrounding circumstances including medium and audience (3)phraseology of statement). These widely varied tests suggest that the decision in Ollman v. Evans was far from being the conclusion of a developing theory which was quickly narrowing down to a common ideology.

Within the Ollman decision itself, there was wide disagreement among the Judges. There are at least two concurring opinions and four opinions which dissent in different parts to the opinion of the Court.

An example of the vast and varying approaches, even within the single Ollman decision, can be found in the lengthy concurring opinion written by Circuit Judge Bork. Judge Bork wrote that the primarily grammatical analysis employed

by the Court was too rigid; rather, the Court should use a balancing test which included "an element of judicial subjectivity". See Ollman v. Evans, 750 F. 2d at 997. Judge Scalia, who now sits on the Supreme Court, strongly dissented from allowing the existence or nonexistence of a constitutional protection to depend on judicial subjectivity. See id. at 1038, 1039.

Judge Scalia also joined in Judge Wald's dissent "to the straight forward contention of the majority opinion that this disparagement should be recorded as a mere nonactionable statement of opinion". Id. at 1036. Although, Judge Wald basically agreed with the plurality's four factor strategy for distinguishing opinion from fact, he disagreed with the conclusion that these factors prevented the statements from being actionable. See id. at 1034,

1035. The crux of Judge Wald's dissent is evidenced in the last few sentences of his opinion where he stated:

> Our decision today, however, means that, even assuming that the statement was utterly false, that it was made with knowledge of its falsity, and that it precipitated Ollman's loss of an important academic position and a decline in his professional standing, the statements authors cannot be made to answer in a suit for libel. I do not believe that the first amendment requires this result, and I therefore respectfully dissent.

Id. at 1035. Petitioner agrees that the first amendment does not require that Respondent escape liability after making a statement which the jury found to be maliciously made and injurious to Petitioner's professional reputation.

The cases following Ollman v. Evans have been far from uniform in applying the Ollman four-factor test. For example, one recent case cites Ollman as authority but uses only the verifiability and surrounding context factors while another Circuit Court also cites the Ollman test but proceeds to analyze the case on its own four-factor test. See e.g. Woods v. Evansville Press Company, 791 F. 2d 480, 487 (7th cir. 1986) (context of statement did not infer fact and comment was not objectively verifiable); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F. 2d at 226 (test derived from past decisions included (1) context and circumstances of statement, (2) the language itself, (3) objective truth or falsity of statement and (4) even if opinion, whether allegation implied undisclosed defamatory facts). Even a recent decision which

adopted the Ollman standard outright chose to expand the factors to "include elements of the concurrence of Judge Bork". Janklow v. Newsweek, Inc., 788 F. 2d at 1302.

Clearly, the test fashioned in Ollman v. Evans has not been adopted as the uniform test for all Courts to use in distinguishing fact from opinion. Several courts have opted instead for the three-factor test fashioned in Information Control Corp. v. Genesis One Computer Corp., 611 F. 2d 781 (9th cir. 1980). See In Re Yagman, 796 F. 2d at 1172 (to distinguish fact from opinion Court must (1) examine total statement in its context; (2) consider all language used; (3) consider surrounding circumstances including medium and audience); Keller v. Miami Herald Publishing Co., 778 F. 2d 711, 717 (11th Cir. 1985). The attempt in Ollman v.

Evans to bring together past decisions and fashion a uniform test was unsuccessful. The continued variations in analysis, even following the Ollman v. Evans decision, clearly evidence that courts are still floundering in uncertainty when attempting to resolve the fact/opinion distinction.

Petitioner believes that the test created in Ollman v. Evans is not a satisfactory answer to the developing theory. The elements are nebulous, without any real substance and offer little, if any, guidelines for the press or public. The court in Ollman v. Evans seems to be trying to formulate a test to determine what the public is apt to believe as fact or discount as rhetoric. The real problem is what the reading public will perceive as damaging to an innocent person's reputation. The Ollman v. Evans decision has been critized on

this basis by other commentators:

> The most telling flaw in each of the tests enumerated above is that none provide sufficient guidance to the writer who wishes to structure a statement to avoid liability for defamation.

Webner, The Fact/Opinion Distinction in First Amendment Libel Law: The Need For a Bright Line Rule, 72 The Georgetown Law Review 1817 (1984). Application of the Ollman test will only continue the confusion and lead to more inconsistent, incomprehensible results. Petitioner urges this Honorable Court, which created the constitutional protection afforded to a statement of opinion, to take this opportunity to delineate the determinative test for distinguishing fact from opinion.

II.

Even If This Court Adopts The Ollman Standard, It Was Misapplied In The Current Case and Should Be Clarified By The Supreme Court Which Created The Distinction Between Fact and Opinion.

Should this Honorable Court choose to adopt the four factor standard established in Ollman v. Evans, Petitioner urges the court to re-examine the Court of Appeals' application of the standard to the facts of this case. The majority in Ollman, in embracing the notion that pure opinions were constitutionally privileged, set out four factors for a court to consider when determining if a statement is an assertion of opinion or fact. See Ollman v. Evans, 750 F. 2d at 979. These four factors were applied to the current case by the El Paso Court of Appeals, and have been outlined earlier in this writ. (See

p. 11, infra). Petitioner urges the Supreme Court, if it adopts the four Ollman factors as the uniform test for distinguishing fact from opinion, that this case is the ideal opportunity to clarify the application of those factors. Before a uniform standard on a question of law can be useful to the courts of this nation, it must be capable of being applied in a uniform manner.

The Texas State Court of Appeals, in applying the first Ollman factor, looked to Webster's New Collegiate Dictionary to determine the common usage and meaning of the word "cheating". El Paso Times, Inc. v. Kerr, 706 S.W.2d at 798 (App. A, p. 6a-7a, infra). Although the definition in Webster's revealed eight meanings which imply bad, improper, unfaithful and deceitful conduct, while revealing only one meaning with a neutral connotation, the Court of Appeals

astonishingly concluded that the word "cheating" had no unique definition in the English language. El Paso Times, Inc. v. Kerr, 706 S.W.2d at 798 (App. A, p. 7a, infra). In contrast, the Ollman court, which created the common usage factor, noted that a statement which has two or more meanings, one of which is non-defamatory, is not prevented from being found defamatory as a matter of law. Ollman v. Evans, 750 F. 2d at 980 fn. 18 ("the definiteness of the alleged defamatory statement should not be confused with the rather curious doctrine of 'innocent construction'").

Petitioner asserts that the "cheating" statement, under common social norms, would be understood by the reasonable reader to have a precise meaning and to give rise to clear factual implications. Thus, it is an actionable defamation under the Ollman v. Evans

holding. See id. at 979, 980. In comparison, prior case law shows that statements similar to the "cheating" accusation have been found to be actionable statements of fact. See Rinaldi v. Holt, Reinhart and Winston, Inc., 366 N.E. 2d 1299, (N.Y.App.-1977), cert. denied, 434 U.S. 969, 98 S. Ct. 514, 54 L. Ed. 2d 456 (1977)(statement that "judge is corrupt" held actionable since in the context of public service, "corruption" implies factual allegations of bribery or official malfeasence); Burns v. McGraw-Hill Broadcasting Co., 659 P. 2d 1351 (Colo. 1983) (statement that wife and children of injured bomb squad officer had "deserted" him held defamatory in context of family relationship).

Petitioner asserts that the Court of Appeals' analysis under the common usage factor was improper and needs to be

clarified by this court. Under the analysis of Ollman v. Evans, the reference to Kerr's "cheating" in the EL PASO TIMES' article had a precise, common meaning universally understood as being derogatory to Kerr's professional reputation. The jury agreed and found the statement to be false, defamatory and malicious. Petitioner urges this court to clarify the application of the common usage factor in the Ollman test and to find that the "cheating" statement should not be classified as protected opinion.

The second factor under the Ollman v. Evans analysis requires the court to determine if the statement is objectively capable of proof or disproof. See Ollman v. Evans, 750 F. 2d at 981. Under this analysis, the "cheating" statement must be classified as verifiable before a reasonable reader could rationally view the statement as conveying actual facts.

See id. at 981.

The El Paso Court of Appeals reached the conclusion that the "cheating" reference could not be characterized as true or false based on the decision in Buckley v. Littell, 539 F. 2d 882 (2nd Cir. 1976), cert. denied, 429 U.S.1062, 97 S.Ct. 785, 50 L.Ed. 2d 777 (1977).

The Court in Buckley v. Littell decided that the terms "fellow traveler", "fascism" and "radical right" were debatable concepts which were "insusceptible to proof of truth or falsity" unlike well-defined allegations of political affiliation such as communism. Id. at 894. Petitioner asserts that the current "cheating" allegation is sufficiently well-defined to be actionable just as the second accusation in Buckley v. Littell was determined to be by the Second Circuit Court. See id. at 895 (accusation that

"Buckley had lied about and implicitly libeled several people" was determined to be actionable). The libel in the current case is similar to the "lying" accusation in Buckley v. Littell since both allege that the defamed party took an action which is susceptible to proof of truth or falsity. The "cheating" accusation in the current case is not the placing of a label, such as "fascist", which the Buckley court determined to be a "loose and varying" concept. See id. at 894.

Similar outcomes were reached in numerous other cases. Cianci v. New York Times Publishing Co., 639 F. 2d 54 (2nd cir. 1980) (rape charge against Mayor held actionable statement of fact, not merely writer's opinion that Mayor was guilty of crime of rape); Rinaldi v. Holt, Rinehard and Winston, Inc., 366 N.E. 2d 1299 (N.Y. App. - 1977), cert. denied, 434 U.S. 969, 98 S.Ct. 514, 54

L.Ed. 2d 456 (1977) (statement that "judge is corrupt" held actionable since in the context of public service, "corruption" implies factual allegations of bribery or official malfeasance); Frank B. Hall & Company, Inc. v. Buck, 678 S.W.2d 612, 617 (Tex. App. - Houston [14th District] 1984, writ. ref'd n.r.e) cert. denied, ____ U.S. ____, 105 S.Ct. 2704,___ L.Ed. 2d ___ (1985) (statements by ex-employer that ex-employee was disruptive, paranoid, hostile, guilty of padding his expense account, irrational, ruthless, and lacking in scruples were not mere expressions of opinion but were false, derogatory statements of fact).

Petitioner urges this Court to clarify the application of the truth/falsity factor in the Ollman test.

The third factor from Ollman v. Evans requires the Court to consider the context in which the statement occurs to

determine the degree to which it is laden with factual content. See Ollman v. Evans, 750 F. 2d at 982. The Ollman decision gave great weight to cautionary or interrogatory language surrounding the alleged libel. See id. at 982-983. The theory is that when a reasonable reader encounters cautionary language, he will tend to discount that which follows. Burns v. McGraw-Hill Broadcasting Co., 659 P. 2d at 1360. Similarly, the Court of Appeals in the current case considered it important to their decision that the article was "replete with 'rhetorical hyperbole'". El Paso Times, Inc. v. Kerr, 706 S.W.2d at 800 (App. A, Page 15a, Infra). The Court in Ollman recognized that not all Courts agree that cautionary language will insulate a libelous allegation as nonactionable. See Ollman v. Evans, 750 F. 2d at 983. For instance, a Second Circuit decision

stated, "It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using explicitly or implicitly the words 'I think'". Cianci v. New York Times Publishing Co., 639 F. 2d at 64. Petitioner urges this Court to guide lower courts as to when, and to what extent, cautionary language should be considered in the surrounding context factor of the Ollman test. Although the newspaper article at bar did include cautionary language, no such language appeared in the area of the article which is the subject of this lawsuit. Petitioner asserts that this case is not proper for the cautionary language insulation created by the Ollman test.

Examining the article in the current case as a whole, Petitioner asserts that a reasonable reader could conclude that the accusation that JAMES A. KERR, JR.

cheated was a factual component of the author's opinion that the federal system was unfair or "less than just", as stated in the title and the article's first paragraph. (App. J, Page 49a, infra.). The author, however, admitted he had no evidence to support his statement that Petitioner had cheated. (S.F. 118-120). The statement is clearly actionable under this factor of the Ollman v. Evans test.

The last factor in Ollman v. Evans requires the Court to examine the broader social context into which the statement fits. See Ollman v. Evans, 750 F. 2d at 983. This factor looks into the type of writing to determine if such would customarily signal the reader that he is likely to be reading opinion rather than fact. See id. at 983. Although the article in the current case appeared in the Opinion/Commentary section of the EL

PASO TIMES, which was significant to the Court of Appeals' decision, that alone should not be sufficient to insulate the "cheating" accusation as nonactionable. Cf. Janklow v. Newsweek, 788 F. 2d at 1304 ("it would be a mistake rigidly to denominate some publications or pages as those dealing only with fact and others as dealing only with opinion").

The commentary page of a nightly newspaper, such as the EL PASO TIMES, is not the sort of forum which is generally associated with lampooning or labor union rhetoric as existed in the prior cases which this factor is based on. See Old Dominion Branch No. 496 National Association of Letter Carriers v. Austin, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) (use of word "traitor" as applied to employee crossing pickett line held to be protected opinion since "such exaggerated rhetoric was common place in

labor disputes"); Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376, 381 (Mass. 1980) (statement that sportscaster attended a course in remedial speaking constituted privileged opinion since it is understood that "a critic may resort to caricature and rhetorical license").

In contrast, the subject matter of the article at bar concerned an alleged attempt by a U.S. attorney to unethically manipulate evidence in the prosecution of a deadly group of drug smugglers. Since this trial had received considerable notoriety in the newspaper, the public expected comments on the circumstances surrounding the trial to be serious, contemplative and careful. Thus, Petitioner asserts that Respondent's accusation that Kerr had "lied" and "cheated" must have been understood by the average reader as being beyond mere rhetoric. The EL PASO TIMES is not the

National Enquirer and the average reader does not expect the contents of the EL PASO TIMES' articles to contain inaccurate or unsupported accusations. Petitioner asserts that the Court of Appeals improperly concluded the broader social context of the current article evidenced it to be opinion.

Each of the four factors in the test fashioned by Ollman v. Evans presents arguable points as applied by the Court of Appeals in the current case. Petitioner urges this Honorable Court, if it chooses to adopt the Ollman test as its own uniform test, to clarify each of these factors so that it will truly be a useful tool and can be applied in a uniform manner.

III.

The Supreme Court Should Delineate When A Statement Of Opinion Is Not

Constitutionally Protected Speech And Establish Guidelines For Application Of The Exception.

The El Paso Court of Appeals recognized a line of case law which holds that "even a statement of opinion will not be protected if it is couched in such a way to imply that the author possesses undisclosed facts". See El Paso Times, Inc. v. Kerr, 706 S.W.2d at 799, citing, Lauderback v. American Broadcasting Co., 741 F. 2d 193, 195-196 (8th cir. 1984), cert. denied, 469 U.S. 1190, 105 S.Ct. 961, 83 L.Ed. 2d 967 (1985). (App. A, p. 7-8, infra). The El Paso Court of Appeals applied this exception as part of the first Ollman factor but found, however, that the exception did not apply to the "cheating" reference in the current case. See id. at 799 (App. A, p. 9a, infra).

Prior case law is inconsistent and

confusing on the independent consideration of whether a statement of opinion implies it is based on undisclosed defamatory facts and is therefore actionable. Compare Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F. 2d at 226 (final factor of analysis is determination of whether opinion implies "allegation of undisclosed defamatory facts") with Ollman v. Evans, 750 F 2d at 985 ("[a] separate inquiry into whether a statement, already classified in this painstaking way as opinion, implies allegedly defamatory facts would, in our opinion, be superfluous").

Petitioner asserts that opinions which imply that they are based on undisclosed facts are actionable. See Cianci v. New York Times Publishing Co., 639 F. 2d at 62-65; Hotchner v. Castillo-Puche, 551 F. 2d 910, 913 (2d cir. 1977), cert denied, 434 U.S. 834, 98

S. Ct. 120, 54 L. Ed. 2d 95 (1977) (if author implies he is privy to facts unknown by reader then "opinion becomes as damaging as an assertion of fact"). Thus, the allegation that Petitioner "cheated" is actionable even if it is classified by this Court as a statement of opinion.

The clear implication of Respondent's article was that the government in general and JAMES W. KERR, JR. in particular cheated in not supplying the list of code names to the de la Torre defense attorney sooner than a day and a half before trial. (App. J, p. 54a-56a, infra). The article sets out no facts which would support a conclusion of dishonorable, false or fraudulent conduct on the part of JAMES W. KERR, JR. Respondent's counsel admitted at the trial court level that "I don't know of any testimony that the government cheated

or hid a list. The article speaks for itself." (S.F. 114). The article implies, however, that the author did have knowledge of facts that there was cheating with regard to the code name list. This is a classic case where the reporter implied that he was privy to facts which were not stated in the publication; thus, the statement is actionable even if it is classified as an opinion.

The foregoing discussion clearly shows that several authorities have held statements of opinion to be actionable in some circumstances. Yet, the doctrine was rejected by the Ollman v. Evans decision. Furthermore, the El Paso Court of Appeals, which claimed to be following Ollman, discussed the doctrine and improperly decided it did not apply to the current case. Lower courts need guidance from this Honorable Court as to

the legitimacy and the applicability of the exception which holds a statement of opinion actionable if it implies that the author possesses undisclosed facts.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this petition for a writ of certiorari should be granted to review the Judgment and Opinion of the Court of Appeals for the Eighth District of Texas.

Respectfully submitted,

Jerry A. Gibson
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201
Counsel of Record

Carrie K. Catalani
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201

APPENDIX

APPENDIX A

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

EL PASO TIMES, INC.,§

Appellant, § NO. 08-85-00025-CV

V. § Appeal from 65th

§ District Court of

JAMES W. KERR, JR., § El Paso County,

Appelle, § Texas. (TC#82-6559)

OPINION

The Appellant, El Paso Times, Inc., was sued by Appellee, an assistant United States attorney, for libel concerning an article which was written by Appellant's reporter, Ron Dusek. Mr. Dusek's article appeared in the editorial section of the paper and was entitled "Federal System Less Than Just?" The article in referring to Mr. Kerr's closing argument in the de la Torre-Garcia trial made the statement that "Kerr lied." The article

contained a further reference to cheating during the same drug conspiracy trial. The jury found that the "lying" phrase in the article was not published with actual malice, but it did find that the "cheating" phrase falsely accused Appellee of cheating and that the acquisition was defamatory and published with actual malice. The jury awarded $500,000.00 in actual damages and $3,000,000.00 in exemplary damages. After remittitur by the trial court, judgment was entered for $100,000.00 actual and $500,000.00 exemplary damages. We reverse and render.

In Points of Error Nos. One and Two, Appellant presents the assertion that the article was an expression of opinion and hence protected under the First and Fourteenth Amendments of the United States Constitution, relying in

part on **Bose Corporation v. Consumers Union of United States, Inc.,** _____ U.S. _____, 80 L.Ed.2d 502, _____ S.Ct._____ (1984). The current test on such an issue is to examine the totality of the circumstances and the full context of the publication to see if it would be received by the average reader as a factual assertion or as a writer's personal opinion. **Ollman v. Evans,** 750 F.2d 970 (D.C. Cir. 1984). These two points of error have merit and we believe are determinative of this appeal. More particularly, the first point is that the evidence established as a matter of law that the statement regarding cheating was a nonactionable protected expression of opinion. The second point urges there was no evidence that Appellant published a false statement of fact.

In view of the jury findings referred to and since a public official,

such as Appellee, must prove by clear and convincing evidence that a statement was published with actual malice before it will be libelous, the statement "Kerr lied" is protected speech. **New York Times v. Sullivan,** 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964). Thus, the only question remaining is whether the statement "[t]he burden is no excuse for cheating" is protected speech. While there is a controversy as to whether or not this statement actually accused the Appellee of cheating, for these points of error we assume for our discussion that the statement does make such an accusation.

All assertions of opinion are protected by the First Amendment of the United States Constitution. **Gertz v. Robert Welch, Inc.,** 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); **Ollman v. Evans, supra.** The real

question then is whether the statement is an assertion of opinion or fact. While the U.S. Supreme Court has never expressed a test for courts to use in making this decision, the **Ollman** Court has utilized a logical and workable four-factor test.

First, the court should analyze the common usage or meaning of the specific language aimed at determining whether there is a precise meaning present for which a consensus of understanding exists, or whether the statement is indefinite and ambiguous. Second, the court should consider the statement's verifiability. Can the statement be objectively characterized as true or false? If a statement cannot be verified, then the trier of fact could not return a verdict to a special issue questioning the truth of the statement (because truth is always a defense in a

libel action **[New York Times, Inc., supra.]**. Third, the court should consider the full context of the statement to determine if the language surrounding the statement would influence the average reader's readiness to infer factual content in the specific language used. Fourth, the broader context or setting in which the statement appears should be analyzed.

In applying the foregoing analysis to the case before us, we believe the statement regarding "cheating" is protected opinion. First, in regard to the common usage or meaning of the statement "[t]he burden is no excuse for cheating", Webster's New Collegiate Dictionary (1980) defines "cheat" as:

> 1: the act or an instance of fraudulently deceiving: DECEPTION, FRAUD 2: one that cheats; PRETENDER, DECEIVER 3: any of

several grasses; esp: the common chess 4: the obtaining of property from another by an intentional active distortion of the truth 1: to deprive of something valuable by the use of deceit or fraud 2: to influence or lead by deceit, trick, or artifice 3: to defeat the purpose or blunt the effects of ... 1a: to practice fraud or trickery b: to violate rules dishonestly (as at cards or on an examination) 2: to be sexually unfaithful .....

Cheating has no unique definition. It may, in some instances, imply criminal acts; it also serves to accuse one of unfair dealings. It is not a word which has a precise meaning. It means different things to different people at different times and in different situations. Since the word "cheating" has no distinct definition, it is not

likely that the average reader of the article assumed that the author, Ron Dusek, had undisclosed facts to back up his statement. This is material here because even a statement of opinion will not be protected if it is couched in such a way to imply that the author possesses undisclosed facts. **Lauderback v. American Broadcasting Company,** 741 F.2d 193 (5th cir. 1984), **cert. denied,** ____ U.S. _____ , 83 L.Ed.2d 967, ____ S.Ct. _____ (1985).

> When an opinion held out for belief is stated so that the average listener would infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual.

Lauderback, supra, at 195-196. We further examine the specific reference to cheating. "In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating." It was the reporter's testimony that his "no excuse for cheating" reference applied to all of the events mentioned in the article including those not involving Appellee. A fair reading of the article as a whole leads to that conclusion as well. The characterization of the article as assertion of fact would be more appropriate with regard to the statement "Kerr lied," but as previously noted, the jury found no malice in this assertion. We are unable to construe the "cheating" language as a factual assertion that Appellee cheated.

Nor in applying the second factor can we say that the cheating reference

can be "objectively characterized as true or false." It constituted the reporter's perception of the federal judicial system. In considering the statement's verifiability, can it be proved or disproved that Kerr cheated? In **Buckley v. Littell,** 539 F.2d 882 (2nd Cir. 1976), **cert. denied,** 429 U.S. 1062, 50 L.Ed.2d 777, 97 S.Ct. 785 (1977), author William F. Buckley was accused of being a fascist. The Second Circuit wrote that the word fascist, used in its context, could not be given a definition which could be used to evaluate the truthfulness of the statement. The court stated that the word was not used in a literal way. In the case at bar, the word "cheating" was used in a way that denotes opinion. It would be impossible to look at the acts of Appellee during the de la Torre-Garcia trial and determine if he was or was not" cheating."

As far as the record before us is concerned, there is no evidence that Kerr either lied or cheated. In the de la Torre drug conspiracy trial, Groos, a government informant, and Moren, a government agent, had both testified that he (de la Torre) had admitted to them that he was one of the financial backers of the conspiracy. De la Torre's testimony in his own defense, in that trial, was a total denial of any complicity. In this libel case (not understanding the legal significance of the government's admission evidence), the reporter testified Kerr lied in arguing that de la Torre admitted to being the moneyman since de la Torre's testimony in court was an absolute denial. When the reporter was asked for any evidence that Kerr had cheated in regard to the submission of the list of code names of certain individuals to attorney Chagra,

none was forthcoming. What is clear is that different people would come to different conclusions concerning Kerr's prosecution of the case and that the reference to cheating could not be proved or disproved or objectively characterized as true or false.

The third criteria to evaluate under the **Ollman** test is the context in which the statement was used.

> [G]iven all the facts of a situation, the public can independently evaluate the merits of the most outrageous opinion and discredit those that are unfounded.

Lauderback, supra, at 195. In **Greenbelt Cooperative Publishing Association v. Bresler,** 398 U.S. 6, 26 L.Ed.2d 6, 90 S.Ct. 1537 (1970), a newspaper had accused a local contractor of indulging in blackmail in his negotiations with the city. The Supreme

Court stated that because the newspaper had given its reasons for accusing Breslar of blackmail, the reader could evaluate the facts and accept or deny the paper's opinion. Dusek's article gives the reader his reasons for his accusation of cheating. The portion of the article pertinent here states:

> More examples of the government appearing to boost its case came during the de la Torre-Garcia trial.
>
> . . .
>
> More suspicious action: Weeks before the trial, the prosecution and defense shared evidence. There was a piece of paper with persons' names on it and their alleged code names to be used during the alleged smuggling operation. The piece of paper did not have Garcia's or de la Torre's

name on it.

A day and a half before trial, the prosecution discovered that it also had another list with all the same names as the first names plus, at the bottom, the names and codes for Garica and de la Torre.

Chagra said a day and a half was not enough time for him to have the second list analyzed by a handwriting expert to determine who wrote the list.

In every case, the prosectution sounds off about its burden to prove guilt. The burden is no excuse for cheating.

And the burden isn't that heavy to begin with.

It seems clear that Mr. Dusek gave the facts upon which he based the article. He states that Chagra is the one who stated that there was not enough

time to have the handwriting expert analyze the list. Whether there was or was not enough time is immaterial because the average reader would assume that Chagra, as de la Torre's defense attorney, would be biased in his assertions. It should also be noted that in the second paragraph, Dusek, in prefacing the entire article, writes "[t]his opinion has nothing to do with the fact ..." This would put the average reader on notice that they were going to read an opinion. The article is also laced with language that is typically used as opinion. Dusek states that the political future of a federal prosecutor is dependent upon whether he can make the "big" case that "will get lots of publicity." By looking at the totality of this article, it is replete with "rhetorical hyperbole" that would let the average reader know that the article

was opinion.

Finally, the court should consider the broader context or setting in which the specific language appears. The article appeared as a Sunday commentary in the editorial section of the newspaper. There are repeated expressions throughout the article referring to the assertions as "[t]his opinion." The author's picture was adjacent to the article which was, as noted, titled "Federal System Less Than Just?" The title itself projects that the article is to contain an opinion. See: **Loeb v. Globe Newspaper Company,** 489 F.Supp. 481 (D.Mass. 1980).

Whether the publication is a protected expression of opinion or an actionable statement of fact is a law question for the court. **Ollman, supra; Lauderback, supra; Lewis v. Time, Inc.,** 710 F.2d 549, 553 (9th Cr. 1983);

Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); **see also: A.H. Belo Corporation v. Rayzor,** 644 S.W.2d 71 (Tex.App.--Fort Worth 1982, writ ref'd n.r.e.); Restatement (Second) of Torts, sec. 566 (1977).

In summary, in applying the **Ollman** test, we conclude the cheating reference is at most indefinite and ambiguous and not susceptible to a precise meaning for which a consensus of understanding exists within the context of the article. We further believe the statement is not verifiable, not capable of being characterized as true or false, and that in its broad context the reference was to the system in general and could not influence the average reader's readiness to infer factual content. Finally, the article appeared in that portion of the paper where the reader was to look for opinion and not news. We conclude that

as a matter of law the statement of cheating complained of was a protected expression of opinion rather than an actionable statement of fact. Appellant's Points of Error Nos. One and Two are sustained and we need not consider the further points and cross-point.

We reverse and render judgment that Appellee take nothing by his suit.

/s/ Charles R. Schulte
CHARLES R. SCHULTE, Justice

March 26, 1986

Before Panel No.1
Ward, Osborn and Schulte, JJ.
(Justice William E. Ward, not sitting)

APPENDIX B

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

65TH JUDICIAL DISTRICT

JAMES W. KERR, JR. §

Plaintiff, §

VS. § NO. 82-6559

EL PASO TIMES, INC. §

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have

previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtoom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must

agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the foreman shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The foreman or any other juror who observes a violation of the court's

instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

The phrase "preponderance of the evidence", as used in this charge, is meant the greater weight of credible evidence.

The words, "libel, libelous and defamatory" are used interchangeably in this charge. Under Texas law, a libel is a communication expressed in printing or writing, or by signs and pictures, or drawings, tending to injure the reputation of a living person and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue of reputation of anyone and thereby expose such person to public hatred, ridicule or financial injury.

"Actual malice" means that the

article in question was published with the Defendant's knowledge that it was false or with reckless disregard of whether it was false or not.

"Actual malice" may not be presumed by the jury. The Plaintiff has the burden to establish actual malice by "clear and convincing evidence."

"Clear and convicing evidence" is defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the existence of actual malice, as that term has been defined. Proof by "clear and convincing evidence" is greater than the "preponderance of the evidence" standard of ordinary civil cases and which you will follow in connection with other issues in this charge. Proof by "clear and convincing

evidence" requires proof which is strong, positive, precise, unmistakable and free from serious or substantial doubt, althought it is not necessary that the evidence be completely unequivocal or undisputed.

"Reckless disregard" requires proof that the false, and defamatory statement was made with a high degree of awareness of its probable falsity. There must be sufficient evidence to conclude that the Defendant in fact entertained serious doubts as to the truth of the publication.

Since actual malice is defined as publication with knowledge of falsity or reckless disregard for whether the publication is false or not, it necessarily involves proof of an inquiry into the state of mind of those responsible for the article at the time of publication. The state of mind

required for actual malice must be brought home to the person or persons having responsibility for the publication of the article.

You are instructed that under our law even the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth.

You are instructed that before recovery of any monetary sum can be awarded the Plaintiff in this cause, the Plaintiff must prove by a preponderance of the evidence that the statement or statements complained of proximately caused him "actual injury". The term "actual injury" means injury to reputation, shame, humiliation, or mental anguish. In order to recover for mental anguish, it is necessary to show something more than mere worry, anxiety, vexation or anger; the prove must show

intense pain of body or mind, or a high degree of mental suffering.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the statement in the article of August 6, 1978, "Kerr Lied" was false?

Answer "We Do" or "We Do Not"

WE, THE JURY, ANSWER: /s/ We Do .

If you have answered Special Issue No. 1 "We Do", then, but not otherwise, answer the following special issue.

SPECIAL ISSUE NO. 2

Do you find from clear and convincing evidence that the statement

"Kerr Lied" was published with "actual malice"?

Answer "We Do" or "We Do Not".

WE, THE JURY, ANSWER: /s/ We Do Not.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the article of August 6, 1978, falsely accused Plaintiff, JAMES W. KERR, JR., of cheating?

Answer "We Do" or "We Do Not".

WE, THE JURY, ANSWER: /s/ We Do .

In answering this issue the jury shall consider whether the ordinary reader would reasonably understand the reference to cheating as applying to

JAMES W. KERR, JR.

Special Issue No. 3A

Do you find from a preponderance of the evidence that such accusation, if any, was defamatory?

Answer "We Do" or "We Do Not".

WE, THE JURY, ANSWER: /s/ We Do .

If you have answered Special Issue No. 3 "We Do", then, but not otherwise, answer the following special issue.

SPECIAL ISSUE NO. 4

Do you find from clear and convincing evidence that the publication accusing JAMES W. KERR, JR., of cheating, if you have so found, was published with

"actual malice"?

Answer "We Do" or "We Do Not".

WE, THE JURY, ANSWER: /s/ We Do .

SPECIAL ISSUE NO. 5

Find from a preponderance of the evidence what sum of money, if any, if paid now in cash would fairly and reasonably compensate JAMES W. KERR, JR., for his injuries, if any, resulting from the publication in question.

Consider the following elements of damage, if any, and none other:

A. Shame and humiliation in the past.

B. Shame and humiliation in the future.

C. Mental anguish in the past.

D. Mental anguish in the future.

E. Injury to his reputation in the past.

F. Injury to his reputation in the future.

You are to consider each element of damage separately, so as not to include damages for one element in any other element.

Answer in dollars and cents, if any.

WE, THE JURY, ANSWER: /s/ $500,000.

If you have answered either of Special Issues 2 and 4 "We Do", the, but not otherwise, answer Special Issue 6.

SPECIAL ISSUE NO. 6

Find from a preponderance of the evidence what sum of money, if any, should be assessed against the EL PASO

TIMES, INC., as exemplary damages for the injuries, if any, to JAMES W. KERR, JR.

"Exemplary damages" means an amount that you may in your discretion award an an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damage.

Answer in dollars and cents, if any.

WE, THE JURY, ANSWER:

/s/ $3,000,000.00.

After you retire to the jury room, you will select your own foreman. The first thing the foreman will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

You will have this charge with you

in the jury room.

/s/ Edward S. Marquez
Judge Presiding

CERTIFICATE

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(To be signed by the foreman if unanimous.)

_____
Foreman

(To be signed by those rendering the verdict if not unanimous)

/s/ Richardo Joryrez

/s/ Grace Feldman

/s/ Ruben R. Valencia

/s/ Steven Winkfield

/s/ Homer James Whitworth

/s/ Charles A. Thornton

/s/ Patrocinio Cardoza

/s/ Mary Ann Antone

/s/ Marcia C. Patterson

/s/ (signature not legible)

APPENDIX C

NO. 82, 6559

JAMES W. KERR, JR.	§	IN THE DISTRICT
	§	COURT
VS.	§	65TH JUDICIAL
	§	DISTRICT
EL PASO TIMES, ET AL	§	EL PASO COUNTY,
	§	TEXAS

JUDGMENT

On the 20th day of March, 1984, came on to be heard the above-styled and captioned cause. Plaintiff, James W. Kerr, Jr., appeared in person and by and through his attorney of record. Defendants, El Paso Times, Inc., and Gannett Company, Inc., appeared by and through their representatives and attorneys of record. A jury was impaneled and testimony was heard. At

the close of the evidence the Defendant, Gannett Company, Inc., filed its Motion for Directed Verdict which was granted. Accordingly, it is ORDERED that Plaintiff, James W. Kerr, Jr., recover nothing of and from Gannett Company, Inc.

After the close of the evidence, the jury retired and subsequently, on the 24th day of March, 1984, rendered its verdict. This verdict was the verdict of 10 of the 12 jurors. The verdict was received and accepted by the Court. The Court has carefully considered the evidence in the case and finds that the evidence is sufficient to support the jury's verdict and further that the evidence satisifies the requirements of the First and Fourteenth Amendments of the United Sates Constitution and Article 1 Section 8 of the Texas Constitution and that the statement in question is actionable. Accordingly, Plaintiff's

motion for Judgment is granted. Defendants' motion for Judgment notwithstanding the verdict and Defendants' motion to disregard jury findings is denied. It is accordingly ORDERED, ADJUDGED and DECREED that James W. Kerr, Jr., recover the sum of $500,000 as actual damages against El Paso Times, Inc., and that Plaintiff, James W. Kerr, Jr., recover $3,000,000 as punitive damages against El Paso Times, Inc., with interest on the entire sum of $3,500,000 at the rate of ten percent per annum from date of judgment. It is further ORDERED that James W. Kerr, Jr., recover costs of court in this behalf expended. It is further ORDERED that execution shall issue on this Judgment unless timely paid.

SIGNED this 31st day of October, 1984.

/s/ Edward S. Marquez
HONORABLE EDWARD S. MARQUEZ

65TH JUDICIAL DISTRICT JUDGE

APPROVED AS TO FORM ONLY:

/s/ Jerry A. Gibson
JERRY A. GIBSON,

Attorney for Plaintiff

/s/ Richard Munzinger
RICHARD MUNZINGER,

Attorney for Defendant

APPENDIX D

IN THE DISTRICT COURT OF

EL PASO COUNTY, TEXAS

65TH JUDICIAL DISTRICT

JAMES W. KERR, JR.,	§	
Plaintiff,	§	
VS.	§	NO. 82-6559
EL PASO TIMES, INC.,	§	EL PASO COUNTY,
	§	TEXAS
Defendant.	§	

ORDER GRANTING NEW TRIAL SUBJECT TO PLAINTIFF'S FILING OF REMITTITUR

On the 29th day of November, 1984, Defendant timely filed its Motion for New Trial requesting the Court to set aside its Judgment of October 31, 1984, and that the court order a new trial upon the merits of the case. The Court finds that such Motion for New Trial is well taken

as to its points asserting that the jury's awards of both actual and exemplary damages were excessive in light of the evidence introduced at trial. Accordingly, it is hereby

ORDERED that the Defendant's Motion for New Trial is granted, that the Court's judgment of October 3, 1984, awarding the Plaintiff recovery of $3,500,000.00 is set aside and held null and void, and that a new trial be held upon all issues in the above case, subject, however, to the following order of remittitur.

IT IS FURTHER ORDERED that should a remittitur in the total amount of $2,900,000.00 be entered into and filed by Plaintiff within ten (10) days of this Order remitting the actual damages awarded by $400,000.00 and the exemplary damages awarded by $2,500,000.00, thus providing that Plaintiff shall have and

recover judgment from Defendant in the amount of $600,000.00 (actual damages of $100,000.00 and exemplary damages of $500,000.00) then this Order Granting Defendant's Motion for New Trial shall be withdrawn, and the judgment of October 31, 1984 shall remain valid, but only in the total amount of $600,000.00 after Plaintiff's filing of the above remittitur.

SIGNED this the 11th day of January, 1985.

/s/ Edward S. Marquez
JUDGE

APPENDIX E

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

EL PASO TIMES, INC.,	§	
Appellant,	§	NO. 08-85-00025-CV
VS.	§	Appeal from 65th
	§	District Court
JAMES W. KERR, JR.,	§	EL PASO COUNTY,
	§	TEXAS. (TC#82-6559)
Appellee,	§	

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in that part of the judgment awarding Appellee James W. Kerr, Jr., judgment for actual and exemplary damages and for costs of court, it is therefore

ordered, adjudged and decreed that the judgment be reversed and this Court proceeded to render such judgment as should have been rendered by the court below, to wit:

IT IS ORDERED, ADJUDGED AND DECREED that James W. Kerr, Jr., do have and recover nothing of and from El Paso Times, Inc.

It is the further order of this Court that the Appellant do have and recover of and from the Appellee all costs in this behalf incurred, both in this Court and in the court below, for which let execution issue, and this decision be certified below for observance.

IT IS SO ORDERED THIS 26TH DAY OF MARCH, 1986.

/s/ Charles R. Schulte
Justice, Court of Appeals for

Before Panel No. 1

Ward, Osborn and Schulte, JJ.

(Justice William E. Ward, not sitting)

APPENDIX F

Court of Appeals
Eighth District of Texas
El Paso City-County Building
El Paso, Texas 79901-2490
Martha (Fran) S. Diaz, Clerk
(915) 546-2240

April 16, 1986

Richard Muzinger
Bryan H. Hall
Scott, Hulse, Marshall, Feuille,
Finger & Thrumond
11th Floor, Texas Commerce Bank Bldg.
El Paso, Texas 79901

Jerry Gibson
P.O. Box BH002
San Antonio, Texas 78201

RE: CASE NO. 08-85-00025-CV

STYLE: El Paso Times, Inc.

V: Kerr, Jr. James W.

ORDER

The Honorable Court of Appeals today rendered its order overruling Appellee's motion for rehearing.

IT IS SO ORDERED THIS 16TH DAY OF APRIL, 1986.

/s/ Charles R. Schulte

Justice, Court of Appeals,

Eighth District

(NO OPINION)

APPENDIX G

SUPREME COURT OF TEXAS

P.O. Box 12248

Supreme Court Building

Austin, Texas 78711

Mary M. Wakefield, Clerk

July 16, 1986

Mr. W. Richard Wagner

Plunkett, Gibson & Allen

6243 N.W. Expressway

P.O. Box BH002

San Antonio, Texas 78201

Mr. Bryan H. Hall

Scott, Hulse, Marshall, Feuille,

Finger, & Thurmond

11 Floor, Texas Commerce Bank Bldg.

El Paso, Texas 79901

Mr. Richard Munzinger
Scott, Hulse, Marshall, Feuille,
Finger & Thurmond
11 Floor, Texas Commerce Bank Bldg.
El Paso, Texas 79901

RE: Case No. C-5368

STYLE: JAMES W. KERR, JR.
V: EL PASO TIMES, INC.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield,
Clerk

BY: /s/ Blanca E. Morin
Deputy

APPENDIX H

SUPREME COURT OF TEXAS

P.O. Box 12248

Supreme Court Building

Austin, Texas 78711

Mary M. Wakefield, Clerk

October 22, 1986

Mr. Jerry A. Gibson

Plunkett, Gibson & Allen

600 Interfirst Financial Center N.W.

P.O. Box BH002

San Antonio, Texas 78201

Mr. Bryan H. Hall

Scott, Hulse, Marshall, Feuille,

Finger, & Thurmond

11 Floor, Texas Commerce Bank Bldg.

El Paso, Texas 79901

Mr. Richard Munzinger
Scott, Hulse, Marshall, Feuille,
Finger & Thurmond
11 Floor, Texas Commerce Bank Bldg.
El Paso, Texas 79901

RE: Case No. C-5368

STYLE: JAMES W. KERR, JR.
V: EL PASO TIMES, INC.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield,
Clerk

BY: /s/ Barry E. Pickett
Deputy

APPENDIX J

FEDERAL SYSTEM LESS THAN JUST?

Ron Dusek

Times Staff Writer

The federal trial of Rick de la Torre and Ben Garcia on drug conspiracy charges last week adds poundage to a premature but quickly developing opinion that the federal justice system in El Paso may be less than just.

This opinion has nothing to do with the fact that de la Torre and Garcia were found guilty of one charge in a four-count indictment and innocent of the others.

Controversy was rampant in the federal courthouse about whether the evidence was sufficient to show guilt and even about whether they should have been indicted in the first place. That

no longer matters since the jury found them guilty.

But, I'll go with the defense attorneys on their claim that the indictments were an afterthought by the government. They were indicted because all the other indictments charged in the original indictment ran off after being released on bail. The prosecution convicted one man, Fred Bella, and got reams of publicity, but had no one else to take to court after making all that noise about machine guns, nine tons of marijuana and some cocaine.

When the defense attorneys expressed that idea, generally in court, Assistant U.S. Attorney Jim Kerr protested to the jury in closing arguments with "Do you think the U.S. Attorney has nothing better to do? ... No other criminals to prosecute?"

Yes, Mr. Kerr, the U.S. Attorney has

nothing better to do. There are no cases pending that will draw more publicity. About 98 percent of all criminal cases handled by the local feds are of non-violent crimes involving illegal aliens or pot smugglers. If is debatable whether or not those are victimless crimes. Top government officials are arguing about whether to give aliens amnesty and to legalize pot. Heroin, bank robbery and murder are another subject.

Kerr appears to have forgotten that U.S. Attorneys and their assistants are political appointees. Their future may depend on whether they can make the "big case" that will get lots of publicity. Political debts are paid by appointments to the U.S. Attorney's office - sometimes in complete disregard for the competancy of the person appointed.

There is one assistant U.S. Attorney

in El Paso who has not, after nearly a year, handled a case in federal district court. That person has been given only menial tasks to perform and on occassion has not handled them professionally, resulting in obvious frustration for the judges and mocking comments by courthouse employees.

Some courtroom actions in the past have suggested that judges, government attorneys and police are not above boosting their cases against defendants by less than admirable methods.

For example, in two cases in which persons were shot by Border Patrol agents, the persons were charged with assault on the agents. In one of the cases, an alien was running across the river back to Mexico. He never touched the agent before he was shot. In the other case, two youths were running from an undercover Border Patrol van thinking

they were being chased by the boyfriends of some of the female objects of their catcalls.

Former local Border Patrol Chief Dale Swancutt admitted the personswere charged, hoping for a conviction, so that the agents could not be sued. In charging the jury, the judge said that fleeing from an agent can be considered assault. The charge was specific. The reasons for running were no defense. In both cases it seemed as if the jury had no choice but to convict.

Innocence or guilt can depend on one word in the charges to the jury and whether the judge allows it.

In another case recently, a Drug Enforcement Administration informant on trial for possession of heroin claimed the DEA asked him to penetrate a smuggling ring. He did. Became part of a deal. Tipped off the DEA. They told

him to get out. He didn't because he claimed in court it was too late. He was arrested when the DEA busted the deal.

The defense attorney asked during the trial that the word "coercion" be added in charges to the jury as a defense. The word "entrapment" was already included, but the definition of entrapment didn't really fit what actually happened. The judge said the attorney's request was too late.

The jury wasn't tacky about definitions and found the man innocent. A man's life could have been crippled because he tripped over a small piece of government red tape - being late.

More examples of the government appearing to boost its case came during the de la Torre-Garcia trial.

In closing arguments, Kerr told the jury that de la Torre admitted to being the money man representing financial

backers for drug smuggling.

Kerr lied. De la Torre did not admit to that. An informant testified that de la Torre told him that.

Kerr's job is to present the evidence and kept it straight or to straighten it if it's been confused by the defense. When the evidence is straight, it will speak for itself.

More suspicious action: Weeks before the trial, the prosecution and defense shared evidence. There was a piece of paper with persons' names on it and their alleged code names to be used during the alleged smuggling operation. The piece of paper did not have Garcia's or de la Torre's name on it.

A day and a half before the trial, the prosecution discovered it also had another list with all the same names as the first list plus, at the bottom, the names and codes for Garcia and de la

Torre.

Chagra said a day and a half was not enough time for him to have the second list analyzed by a handwriting expert to determine who wrote the list.

In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating.

And the burden isn't that heavy to begin with.

Chagra said to the jury, "In reality, when you read that someone is indicted, you sort of think he's guilty. Because usually where there's smoke there's fire. This courtroom is not a sterile environment" where people are perfectly objective and fair.

It always seems amusing when Judge William Sessions or Judge John Wood tells a jury, after a prosecutor makes an irrelevant, nasty comment, to ignore that

comment.

It's hard to believe that the judge really believes the jury is a computer with an erase button ... and that the words accidentally slipped off the lawyer's tongues.

Here's what takes the cake: What kind of attitude does it suggest? - On the first day of the trial, Wood kept the jury until about 7 p.m., on the second day, from 8:30 a.m., to about 7 p.m., on the third day from 9 a.m., to 11 p.m., and the last day from 7:30 a.m., until they reached a verdict at about 4:30 p.m.

The unannounced reason for such long days for the jury, of which some members were at retirement age: so Judges Wood and Sessions could go fishing together.

86-1192

Supreme Court, U.S.
FILED
FEB 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1191

JAMES W. KERR, JR.,
Petitioner,
vs.
EL PASO TIMES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

RICHARD MUNZINGER*
BRYAN H. HALL

SCOTT, HULSE, MARSHALL,
FEUILLE, FINGER & THURMOND
11th Floor
Texas Commerce Bank Building
El Paso, Texas 79901
(915) 533-2493
Attorneys for Respondent

**Counsel of Record*

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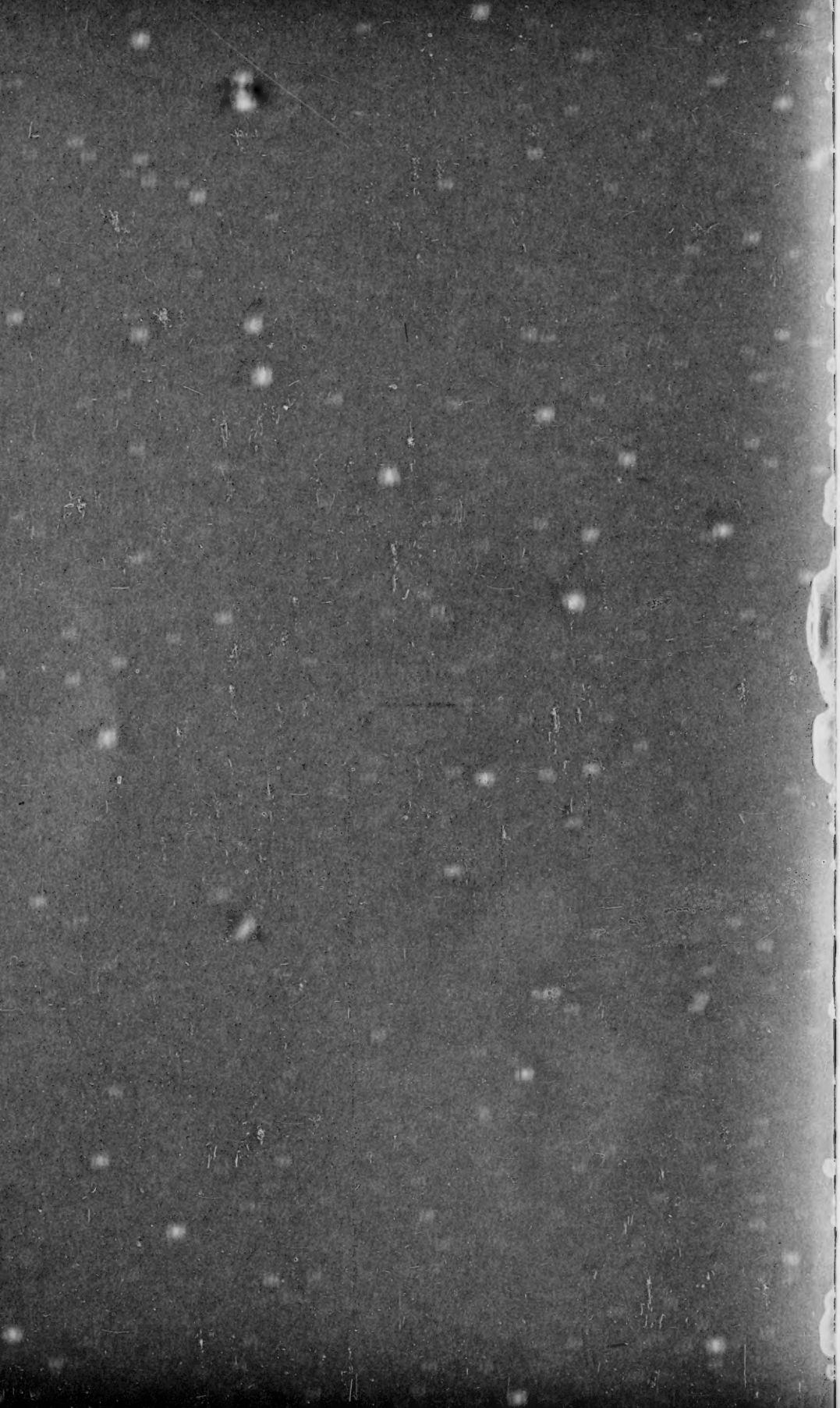

QUESTIONS PRESENTED

Whether a column published in a newspaper's "Opinion/Commentary" section was constitutionally protected both as opinion and as not published with actual malice; and whether Texas law required judgment for Respondent.

TABLE OF CONTENTS

Subject	Page
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	9
ARGUMENT	10
1. The Column Was Protected Opinion	10
2. The Record Does Not Contain Clear and Convincing Evidence of Publication With Actual Malice	12
3. Texas Law Requires Judgment for Respondent	16
CONCLUSION	20
CERTIFICATE OF SERVICE	20
APPENDIX A—The August 6, 1978 Column	
APPENDIX B—Record References	

INDEX OF AUTHORITIES

		Page
1.	*A. H. Belo Corp. v. Rayzor,* 644 S.W.2d 71 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.)	12,17,18
2.	*Bandelin v. Pietsch,* 563 P.2d 395 (Idaho 1977), *cert. denied,* 434 U.S. 891, 54 L.Ed.2d 177	14
3.	*Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 80 L.Ed.2d 502 (1984)	10
4.	*Church of Scientology v. Cazares,* 638 F.2d 1272 (5th Cir. 1981)	11
5.	*Cotulla v. Kerr,* 74 Tex. 89, 11 S.W. 1058 (Tex. 1889)	17
6.	*Denton Publishing Co. v. Boyd,* 460 S.W.2d 881 (Tex. 1970)	17
7.	*Doubleday & Co., Inc. v. Rogers,* 674 S.W.2d 751 (Tex. 1984)	12
8.	*Dun & Bradstreet, Inc. v. O'Neil,* 456 S.W.2d 896 (Tex. 1970)	12
9.	*El Paso Times, Inc. v. Kerr,* 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.)	6,8,9,11
10.	*El Paso Times, Inc. v. Trexler,* 447 S.W.2d 403 (Tex. 1969)	12,16
11.	*Fitzjarrald v. Panhandle Publishing Co.,* 228 S.W.2d 499 (Tex. 1950)	8,17
12.	*Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123, 51 L.Ed.2d 573 (1977)	19
13.	*Foster v. Upchurch,* 624 S.W.2d 564 (Tex. 1981)	12,16
14.	*Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 41 L.Ed.2d 789 (1974)	10,12
15.	*Glover v. Herald Co.,* 549 S.W.2d 858 (Mo.), *cert. denied,* 434 U.S. 965, 54 L.Ed.2d 451 (1977)	14
16.	*Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6, 26 L.Ed.2d 6 (1970)	10
17.	*Hawkins v. Oden,* 459 A.2d 481 (R.I. 1983)	11

		Page
18.	*Herald-Post Publishing Co. v. Hervey,* 282 S.W.2d 410 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.)	17
19.	*Holly v. Cannady,* 669 S.W.2d 381 (Tex. App.—Dallas 1984, no writ)	12
20.	*Houston Printing Co. v. Hunter,* 105 S.W.2d 312 (Tex. Civ. App.—Fort Worth), *aff'd per curiam,* 106 S.W.2d 1043 (1937)	8
21.	*Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781 (9th Cir. 1980)	11
22.	*International & G.N.R. Co. v. Edmundson,* 222 S.W. 181 (Tex. Comm'n App. 1920, opinion approved)	16
23.	*Janklow v. Newsweek,* 788 F.2d 1300, (8th Cir.), *cert.* denied, ____ U.S. ____, 93 L.Ed. 2d 249 (1986)	10
24.	*Lauderback v. American Broadcasting Companies, Inc.,* 741 F.2d 193 (8th Cir. 1984), *cert. denied,* 469 U.S. 1190, 83 L.Ed.2d 967 (1985)..	10
25.	*Lewis v. Time, Inc.,* 710 F.2d 549 (9th Cir. 1983)	10
26.	*Leyendecker & Associates, Inc. v. Wechter,* 683 S.W.2d 369 (Tex. 1984)	17,18,19
27.	*Mayfield v. Gleichert,* 484 S.W.2d 619 (Tex. Civ. App.—Tyler 1972, no writ)	16
28.	*Mr. Chow of New York v. Ste. Jour Azur S.A.,* 759 F.2d 219 (2d Cir. 1985)	10
29.	*New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686 (1964)	2,12,16
30.	*Old Dominion Branch No. 496, National Ass'n. of Letter Carriers v. Austin,* 418 U.S. 264, 94 S. Ct. 41 L.Ed.2d 745 (1974)	10
31.	*Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984)	10
32.	*Orr v. Argus-Press Co.,* 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960, 59 L.Ed.2d 773 (1979)	14
33.	*Rawlins v. McKee,* 327 S.W.2d 633 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.)	17

		Page
34.	*Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969, 54 L.Ed.2d 456 (1977)	10
35.	*Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983)	10
36.	*Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978)	16
37.	*Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980)	14
38.	*Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.)	19
39.	*Sherman v. Times Herald Printing Co.*, 671 S.W.2d 700 (Tex. App.—El Paso 1984, no writ)	12
40.	*St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed.2d 262 (1968)	12
41.	*Time, Inc. v. Pape*, 401 U.S. 279, 28 L.Ed.2d 45 (1971)	13,14
42.	*Times Pub. Co. v. Ray*, 1 S.W.2d 471 (Tex. Civ. App.—Eastland 1927), *aff'd*, 12 S.W.2d 165 (Tex. Comm'n App. 1929, opinion adopted)	8
43.	*Times-Mirror Co. v. Harden*, 628 S.W.2d 859 (Tex. App.—Eastland 1982, writ ref'd n.r.e.)	16

OTHERS

1.	RESTATEMENT (SECOND) OF TORTS §§ 566 and 614 (1977)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1191

JAMES W. KERR, JR.,
Petitioner,

vs.

EL PASO TIMES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE

Petitioner's recitation of the facts is misleading and incomplete, requiring a full restatement. The Petition creates two important inferences not supported by the record: (1) That the jury's verdict found a so called " 'cheating' statement" to have been false, defamatory and maliciously published; and (2) that the Court of Appeals found the evidence of actual malice sufficient and thus was required to determine whether this "cheating statement" was opinion or fact. In fact, as will be seen: (1) The trial court's Special Issue inquired whether the entire article, not an isolated phrase or statement, falsely accused Petitioner of cheating; and (2) the Court of Appeals

sustained Respondent's first two points of error and never reached those points concerning the evidence of actual malice.[1]

1. Facts

In its Sunday "Opinion/Commentary" section of August 6, 1978, *The El Paso Times (The Times)* published a column authored by one of its reporters, Ronald Dusek (Dusek), entitled "Federal System Less Than Just?". *The Times'* format additionally labeled it as opinion since Dusek's photograph appeared with the column; something allowed by the paper only with editorial, commentary columns. It was an opinion piece, based upon his observations while covering the federal courthouse, in which Dusek expressed his concerns about the fairness of the federal justice system as administered in El Paso, Texas. The trial of *United States of America v. Rick de la Torre and Ben Garcia,* a drug conspiracy case, had just concluded on the preceding Thursday; Dusek had covered the entire trial, reporting on it daily in the news columns of *The Times.* Petitioner, James W. Kerr (Kerr), was the prosecuting Assistant United States Attorney in the *de la Torre* case and part of the column reflected Dusek's observations and criticisms of Petitioner's handling of that prosecution.

Kerr's trial pleading, his Fourth Amended Original Petition, alleged two counts: that he had been libeled by the specific statement, "Kerr lied", and that the column as a whole accused him of "cheating in the performance of his public duties". *The Times* answered that the column was a constitutionally protected expression of opinion and not actionable, that it did not accuse Kerr of cheating, and that, in any event, it was not published with actual malice. The trial court held Kerr to be a public official under *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686 (1964), and submitted the issue of actual malice to the jury.

---

[1] Respondent urged nineteen separate points of error in the Court of Appeals: the article was privileged opinion (Points 1 and 2), not maliciously published (Points 3 and 4), the damage verdict was unsupported by the evidence (Points 5 through 13, 16 & 17), the damage instruction was constitutionally defective as permitting recovery for protected speech (Points 14 & 15) and errors in the court's charge (Points 18 & 19).

Both claimed libels were submitted to the jury which found that the statement "Kerr lied" was not published with actual malice, but that the column's alleged accusation of cheating was false, defamatory and maliciously published. The jury awarded Petitioner $500,000.00 in "actual" damages and $3,000,000.00 in exemplary damages. On January 11, 1985, the trial court entered its Order Granting New Trial Subject to Petitioner's Filing of Remittitur, requiring a reduction to $100,000.00 in "actual" damages and $500,000.00 in exemplary damages, which Kerr accepted on January 18, 1985.

The Times appealed from the $600,000.00 judgment to the Court of Appeals for the Eight District of Texas which sustained the first two points of error and rendered judgment for *The Times,* holding that the publication was a constitutionally protected expression of opinion. The Court of Appeals did not reach *The Times'* remaining seventeen points of error relating to actual malice, damages and error in the charge. The Texas Supreme Court refused to grant a writ of error finding no reversible error.

As previously stated, *The Times* published Dusek's column in the "Opinion/Commentary" section of its Sunday, August 6, 1978 edition. In general, the column expressed Dusek's concern about the fairness of the administration of federal criminal justice in El Paso; it was based upon his observation of several federal criminal trials and was published three days after Kerr's successful prosecution of the locally controversial *de la Torre* drug conspiracy case. The column alluded to a number of instances not involving Kerr which Dusek had observed while covering the federal courthouse for *The Times.* These incidents, including prior federal prosecutions, had caused him to question the fairness of the federal judicial system in El Paso. Dusek testified as to the facts supporting each paragraph in the column.[2]

The prior events recited by Dusek should have concerned any citizen and were certainly open to comment and criticism. He cited an incident in which an alien was attempting to run

---

[2] The entire column is reproduced as Appendix A with each paragraph separately numbered; Appendix B lists references to those portions of the record supporting the statements in each paragraph.

back across the river into Mexico and was shot by a border patrol agent; the fleeing alien was charged with assault notwithstanding he had not touched the agent before he was shot. The El Paso Border Patrol Chief had publicly admitted that the illegal alien was charged with assault in order to prevent a civil suit against the agent.

In a second case two youths were fleeing from an unmarked undercover border patrol van believing that they were being chased by the boy friends of some females they had been teasing; they too were shot at and arrested. In another, a DEA informant on trial for possession of heroin had claimed that the DEA had asked him to penetrate a smuggling ring; he did, but was unable to get out prior to the DEA "bust" and was arrested and charged along with the other defendants. When the informant was tried, his defense attorney requested that the word "coercion" be added to the court's charge and that the word "entrapment" be better defined; the court refused this request saying that it "was too late." Dusek had covered all of these trials as a reporter for *The Times* and had witnessed and reported the events he criticized in the column.

On Monday, July 31, 1978, in a trial presided over by Judge John H. Wood, Jr., the United States began its prosecution of Rick de la Torre and Ben Garcia on criminal charges of conspiracy with intent to import and distribute cocaine and marijuana.

Some weeks prior to the trial the government had produced a list with the alleged conspirators' code-names on it; then, a day and a half before trial the prosecution produced a second list which for the first time included the defendants' names.

Richard Gross, a paid informer and government undercover agent, was the first witness. Gross testified that de la Torre, on several past occasions, had supplied the money for expenses involved in drug smuggling efforts. Gross also claimed that de la Torre had told him that "... this would make up for some of the losses that he [de la Torre] had had in the past...."

When de la Torre testified, however, he denied that he had ever been a member of the alleged conspiracy, that he had at any time represented himself as the financial backer of the group, and that he had ever told Gross that he needed this smuggling transaction to go well to make up for other drug losses.

Kerr concedes de la Torre never admitted during the trial that he had a financial involvement in any drug smuggling or other criminal conspiracy of any sort. Nevertheless, during his summation or Thursday, August 3, 1978, Kerr argued to the jury:

> We have Mr. de la Torre admitting during the course of the conspiracy that he had a financial involvement in the 17,000 pounds of marijuana that was lost in Ardmore and that he now needed this case to be successful, to make up for these past criminal business losses.

A moment later he argued:

> And who is the person who was distributing the money? Who was the person who was representing these financial backers? It was the pillar of the community. It was Mr. Rick de la Torre. By his own admission he had a financial involvment. He was representing the financial backers.

In his final argument, de la Torre's defense attorney, Lee Chagra, responded:

> And to ask you as human beings to convict these people—he says Mr. de la Torre admitted that he was a financial backer. I didn't hear him admit it. Mr. Gross said he admitted it. Mr. Gross said he admitted it on the 15th. Mr. Gross is a liar. And there is no gentle way to put it.

The jury convicted de la Torre and Garcia on only one of the four counts of the indictment.

Dusek covered the entire trial and was personally present at all proceedings, including the final argument. He had

factually and accurately reported on the events that occurred at the trial on a daily basis in *The Times.* Kerr makes no complaint regarding these news articles or their accuracy. The guilty verdict was returned on Thursday, August 3, which, Dusek believed, was the deadline for his column if it was to appear in Sunday's "Opinion/Commentary" section.

Dusek repeatedly testified to his firm belief that Kerr had lied in his argument in an attempt to mislead the jury, and that the government had failed to produce the second code-name list in sufficient time prior to trial. He did not believe these actions were "fair". With regard to the article's only reference to cheating, Dusek testified that the statement, "The burden is no excuse for cheating", was a general statement referring to the entire column. Significantly, the Court of Appeals held that "A fair reading of the article as a whole leads to that conclusion as well." *El Paso Times, Inc. v. Kerr,* 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

Dusek recalled that there had been testimony and controversy in the *de la Torre* trial regarding the two conflicting code-name lists and that the second list reflected that the code-names for the names of de la Torre and Garcia had been added at an unknown subsequent date by an unknown person. The first code-name list did not include the names of de la Torre or Garcia. His memory of the controversy is borne out by the transcript of the *de la Torre* trial. Dusek testified without rebuttal by Kerr that attorney Chagra had, in fact, complained to Dusek that a day and a half was not enough time for him to have the handwriting on the second list analyzed to determine its origin and authenticity.

Dusek was not a lawyer and had no legal training. He began covering the El Paso federal courthouse in early 1977, and had never before covered the criminal or civil justice system, state or federal. He testified that at the time of publication he did not know the difference between a judicial admission and an admission against interest, and had no knowledge or experience with law, criminal procedure or the Federal Rules of Evidence regarding admissions.

Kerr produced no evidence that he suffered any harm to his reputation, either past or future. He failed to produce a

single witness who thought less of him after the publication or claimed that it had any effect on Kerr or their perception of him. Kerr himself was unable to testify that the article had adversely affected his reputation or career in any way whatsoever. The lack of injury to Kerr's reputation is best reflected by his continuing successful and ever advancing career in the federal government and his ability to work at the same level of success and achievement after as before publication. Kerr stipulated that he suffered no pecuniary loss or damage as a result of the article and admitted that it was an unsuccessful assassination attempt of November 21, 1978 that drastically altered his life-style and profession, not Respondent's August 6 publication.[3] He testified that his income has increased steadily since publication and that he has always been rated as either an "outstanding" or "satisfactory" federal employee, entitling him to all available promotions and pay raises. He received two high honors following publication: the Attorney General's Medal and Senator Tower's recommendation for nomination as judge of the U.S. District Court for the District of Columbia, admittedly one of the nation's most prestigious federal trial benches. Kerr's current position as a federal Administrative Law Judge is one so desirable that he had sought it long prior to August 6, 1978 and the assassination attempt.

In short, Kerr was unable to point to a single facet of his life that was affected or changed in any way by the *The Times'* publication. He was unable to produce any evidence that he had suffered any physical harm or strain, and did not offer any evidence that he had suffered any physical or mental harm. He claimed no lost sleep, not even a single headache or other physical side-effect. Instead, Petitioner simply testified, in a conclusory and self-serving manner, that he was "embarrassed", "humiliated", "shocked", "disappointed", and "hurt" by the publication and that he simply "couldn't believe it". He

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[3] Kerr was the target of an assassination attempt in San Antonio in November, 1978; that attempt preceded by a few months the murder of United States District Court Judge, John H. Wood, Jr. Petitioner originally claimed that *The Times'* news reports and the column at issue had precipitated the assassination attempt, for which he sought damages. Kerr, however, dropped this claim shortly prior to trial and finally agreed at trial that he could not, in good faith, claim that the August 6 column or *The Times* had caused the attempt on his life.

testified that the article still "bothers him" and "disturbs him" because the record has "not yet been set straight."

2. The "Cheating" Verdict

Petitioner suggests at page 5 of his Petition that the "... article contained Dusek's accusations that 'Kerr lied' and 'cheat[ed]' in his prosecution of the *de la Torre* trial." This "accusation of 'cheating' ", he states at page 6, was found by the jury to have been false, defamatory and maliciously published. Then, most significantly, he suggests, at pages 8 and 9, that the Court of Appeals approved the verdict as to actual malice and, thus, "... had to decide whether the statement was an assertion of fact or opinion in order to determine if the 'cheating' statement was also protected speech under the Constitution." The Court of Appeals incorrectly stated that the jury found "[t]he 'cheating' phrase falsely accused Appellee of cheating...." *Kerr,* 706 S.W.2d at 797.

In fact, Special Issue No. 3 inquired whether "... *the article of August 6, 1978* falsely accused Plaintiff... of cheating...". (emphasis added). No issue making inquiry as to any specific language or phrase within the article was requested or submitted.[4] In the courts below, Respondent urged error in the manner in which the trial court had charged the jury: the charge impermissibly assumed the article accused Petitioner of cheating, a controverted fact issue; and failed to inquire whether the ordinary reader would have so interpreted the article, a fact essential to Plaintiff's recovery under Texas law. Indeed, the Court of Appeals was aware of the problem with the court's charge and Respondent's points on that issue as is evidenced at page 798 of its opinion wherein it recognized that there was "controversy" as to whether the article made the

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[4] If Petitioner sought a finding that the "no excuse for cheating" phrase was false, defamatory and published with actual malice, under Texas law the issues should have been framed with the specific language as was done in Special Issue No. 1 rather than inquire as to the article as a whole. *See Houston Printing Co. v. Hunter,* 105 S.W.2d 312 (Tex. Civ. App.—Fort Worth), *aff'd per curiam,* 106 S.W.2d 1043 (Tex. 1937); *Times Pub. Co. v. Ray,* 1 S.W.2d 471 (Tex. Civ. App.—Eastland 1927), *aff'd,* 12 S.W.2d 165 (Tex. Comm'n App. 1929, opinion adopted); *Fitzjarrald v. Panhandle Publishing Co.,* 228 S.W.2d 499 (Tex. 1950).

claimed accusation. That court, however, assumed for discussion purposes that the accusation had been made. *Kerr,* 706 S.W.2d at 798.

In *dictum,* the Court of Appeals stated erroneously that Dusek, when challenged, failed to provide evidence Kerr had cheated in connection with the code-name lists. *Kerr,* 706 S.W.2d at 799. The Court misinterpreted Dusek's testimony. In fact, he testified that he believed the instances cited in his column were unfair, including Kerr's handling of the code-name lists. Dusek testified that the statement "The burden is no excuse for cheating" was a general statement, referring to the entire story, including his belief that Kerr had lied in his closing argument, that Kerr's handling of the two code-name lists was not fair and the other criticized incidents not involving Kerr. He testified that there was testimony and controversy in the *de la Torre* trial regarding the two conflicting code-name lists, and that the evidence reflected that the code-names for de la Torre and Garcia had been added to the second list. His memory of the controversy was confirmed by the transcript of the criminal trial admitted into evidence. Dusek testified without rebuttal that de la Torre's attorney, Lee Chagra, had, in fact, complained to Dusek that a day and a half was not enough time for him to have the handwriting on the second list analyzed to determine its origin and authenticity. Dusek firmly believed in the truth and accuracy of his opinions both at the time he wrote and at the time of trial. He formed his opinions by being present for the entire *de la Torre* trial and by his personal knowledge gained by covering the various other events commented on in his column.

SUMMARY OF THE ARGUMENT

The Times submits that by reason of its content, format, location and subject "Federal System Less Than Just?" is a constitutionally protected expression of opinion and is not actionable. Further, Dusek held an honest belief in the accuracy and truth of his column, and there is no clear and convincing evidence that any reference to cheating was published with actual malice. The evidence does not support the award of actual and exemplary damages since Kerr was not injured by the statements in question. Under Texas law, the

column, if libelous, was, at most, libelous *per quod* and judgment was required for Respondent since there was no proof of injury to Petitioner's reputation.

ARGUMENT

1. The Column Was Protected Opinion

Published as a column in the "Opinion/Commentary" section of the paper, labeled as opinion both by its format and content, laced with cautionary words and the author's perceptions and impressions, and accurately disclosing its supporting facts, "Federal System Less Than Just?" was protected opinion.

The phrase Petitioner seizes upon is itself so clearly opinion as to hardly merit discussion:

> "In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating."

Is this not simply another way of arguing that "the end is not justified by the means"—a point endlessly debated in every conceivable context.

Regardless of whether a new or existing "test" is applied to the column, it is patently protected opinion. *See Greenbelt Cooperative Publishing Ass'n. v. Bresler,* 398 U.S. 6, 26 L.Ed.2d 789 (1974); *Old Dominion Branch No. 496, National Ass'n. of Letter Carriers v. Austin,* 418 U.S. 264, 41 L.Ed.2d 745 (1974); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 41 L.Ed.2d 789 (1974); *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 80 L.Ed.2d 502 (1984); *Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984); *Lauderback v. American Broadcasting Companies, Inc.,* 741 F.2d 193 (8th Cir. 1984), *cert. denied,* ____ U.S. ____, 83 L.Ed.2d 967 (1985); *Janklow v. Newsweek,* 788 F.2d 1300 (8th Cir. 1986); *Lewis v. Time, Inc.,* 710 F.2d 549, 553 (9th Cir. 1983); *Rinsley v. Brandt,* 700 F.2d 1304, 1309 (10th Cir. 1983); *Mr. Chow of New York v. Ste. Jour Azur S.A.* 759 F.2d 219 (2d Cir. 1985); *Rinaldi v. Holt, Reinhart & Winston, Inc.,* 42 N.Y.2d 369, 366 N.E.2d 1299

(1977), *cert. denied,* 434 U.S. 969, 54 L.Ed.2d 456; *Hawkins v. Oden,* 459 A.2d 481 (R.I. 1983); *Church of Scientology v. Cazares,* 638 F.2d 1272 (5th Cir. 1981); *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781 (9th Cir. 1980); and *see* RESTATEMENT (SECOND) OF TORTS § 566, comment § 614.

The courts have articulated several analyses to distinguish protected expressions of opinion from actionable statements of fact. In substance, the cases agree the court should consider the totality of the circumstances surrounding the publication to determine whether the average, ordinary reader would view it as fact or opinion. In examining the circumstances, the courts typically look at the common meaning and usage of the specific language complained of, whether the statement is capable of objective characterization as true or false, whether the language as a whole reflects that it is opinion, and, finally, the overall setting in which the article appeared.[5]

Under the above authorities "Federal System Less Than Just?" qualifies as constitutionally protected opinion. The only language in the column that has any reference to cheating is polemical and subjective:

> "In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating."

By itself the statement cannot possibly be construed as a factual assertion that Petitioner cheated in connection with the lists or otherwise.

Second, the quoted statement is not capable of being objectively characterized as true or false. The column reflects Dusek's perceptions of Petitioner's state of mind or intention, neither of which is not objectively verifiable. Third, the column's language as a whole reflects that it is opinion, and the reader is constantly reminded of its nature. The column

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[5] The Restatement and some early, state authorities distinguished between "pure" and "mixed" opinion, protecting the former due to the disclosure of the facts giving rise to the opinion. That analysis is unnecessary and inappropriate here in light of the Court of Appeals' finding that ". . . Mr. Dusek gave the facts upon which he based the article." See *Kerr,* 706 S.W.2d at 800.

immediately identifies itself as opinion both by its title and the cautionary words which appear throughout.

Finally, it was published in *The Times* in an opinion setting—the "Opinion/Commentary" section. The column ran with Dusek's picture which was done, in *The Times,* only with opinion columns. Thus, by reason of its location, format and content, the column must be considered opinion under any standard.

2. The Record Does Not Contain Clear and Convincing Evidence of Publication With Actual Malice

As a public official, Kerr was required to prove actual malice by clear and convincing evidence.[6] *New York Times Co. v. Sullivan, supra; St. Amant v. Thompson,* 390 U.S. 727, 20 L.Ed.2d 262 (1968). *See also Gertz v. Robert Welch, Inc., supra; Foster v. Upchurch,* 624 S.W.2d 564 (Tex. 1981); *A. H. Belo Corp. v. Rayzor,* 644 S.W.2d 71, 84-85 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e).

Thus, the inquiry of whether *The Times* published with actual malice focuses on *The Times'* state of mind at the time of publication; it is, under both federal and Texas law, necessarily a subjective rather than an objective test. *Foster v. Upchurch,* 624 S.W.2d at 566; *El Paso Times, Inc., v. Trexler,* 447 S.W.2d 403 (Tex. 1969); *Dun & Bradstreet, Inc. v. O'Neil,* 456 S.W.2d 896 (Tex. 1970); *Doubleday & Co., Inc. v. Rogers,* 674 S.W.2d 751, 756 (Tex. 1984); *Sherman v. Times Herald Printing Co.,* 671 S.W.2d 700, 703 (Tex. App.—El Paso 1984, no writ); *Holly v. Cannady,* 669 S.W.2d 381, 384 (Tex. App.—Dallas 1984, no writ).

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[6] The trial court correctly defined clear and convincing evidence as " . . . that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the existence of actual malice, as that term has been defined. Proof by 'clear and convincing evidence' is greater than the 'preponderance of the evidence' standard of ordinary civil cases and which you will follow in connection with other issues in this charge. Proof by 'clear and convincing evidence' requires proof which is strong, positive, precise, unmistakable and free from serious or substantial doubt, although it is not necessary that the evidence be completely unequivocal or undisputed."

The Court must bear in mind that the jury found the statement "Kerr lied" not to have been maliciously published. Secondly, Special Issues 3 through 5 were directed to the entire column rather than a particular phrase. Therefore, the question is whether there is clear and convincing evidence that the entire column, insofar as it allegedly implied Kerr cheated, was published with actual malice.

The uncontroverted evidence was that Dusek firmly believed in the validity and accruacy of opinions expressed both at the time he wrote and at the time of trial. His opinions were formed during the *de la Torre* trial and by personal knowledge gained covering the various events and matters commented on in his column. Most significantly, as the attached Appendix B reflects, every statement of fact in the article was supported by competent, corroborating evidence.

There was no evidence of animosity between Dusek and Kerr nor any suggestion of an intent to harm. At best, the record could support an argument that Dusek misinterpreted Kerr's summation and conduct.

If Dusek, in fact, misinterpreted the actions of Kerr and misunderstood the legal rules and implications, his misunderstanding would not be sufficient evidence of actual malice. Any argument to the contrary has been foreclosed by *Time, Inc. v. Pape,* 401 U.S. 279, 28 L.Ed.2d 45 (1971). Pape sued *Time* magazine claiming that he had been libeled by *Time's* reporting of allegations of police brutality as if they were fact. In sustaining the trial court's summary judgment for *Time* and reversing the Circuit Court, this Court said:

> Time's omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under New York Times. 401 U.S. at 290, 28 L.Ed.2d at 53.

Reviewing the policy considerations which supported the decision in *New York Times Co. v. Sullivan,* the Court continued:

> . . . These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided disrection of a jury.
>
> In certain areas of the law of defamation, New York Times added to the tort law of the individual States a constitutional zone of protection for errors of fact caused by negligence. The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability. This protection would not exist for errors of interpretation were the analysis of the Court of Appeals to be adopted, for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." 401 U.S. at 291, 28 L.Ed.2d at 54.

The courts have followed the lead of *Time, Inc. v. Pape* and have been particularly protective of speech which involves the interpretation of the acts and deeds of public officials. *See Orr v. Argus-Press Co.,* 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960, 59 L.Ed.2d 773 (1979); *Ryan v. Brooks,* 634 F.2d 726 (4th Cir. 1980); *Glover v. Herald Co.,* 549 S.W.2d 858 (Mo. 1977), *cert. denied,* 434 U.S. 965, 54 L.Ed.2d 451; *Bandelin v. Pietsch,* 563 P.2d 395 (Idaho 1977), *cert. denied,* 434 U.S. 891, 54 L.Ed.2d 177.

The applicability of these cases is obvious. If one of several rational interpretations of an ambiguous document cannot, as a matter of law, be evidence of actual malice, how can one of several possible interpretations of clearly ambiguous jury argument and conduct at trial be different?

Kerr's argument on the point at issue was obviously ambiguous.

> We have Mr. de la Torre admitting during the course of the conspiracy that he had a financial involvement in the 17,000 pounds of marijuana that was lost in Ardmore and that he now needed this case to be successful, to make up for these past criminal business losses."
>
> * * *
>
> And who is the person who was distributing the money? Who was the person who was representing these financial backers? It was the pillar of the community. It was Mr. Rick de la Torre. By his own admission he had a financial involvement. He was representing the financial backers. (Px. 5, p. 1095; Dx. 24).

It is arguable that one could believe that he meant that de la Torre had admitted during the trial that he was the so-called "moneyman" of the organization or, on the other hand, that he meant that he had made that admission to Gross prior to trial—or both.

Dusek's interpretation is clearly reasonable—it was shared by defense counsel Chagra who told the jury:

> . . . He says Mr. de la Torre admitted that he was a financial backer. I didn't hear him admit it. Mr. Gross said he admitted it.

Dusek's good faith in choosing the former interpretation was not shaken; on the contrary, he steadfastly maintained that he honestly and sincerely believed that Kerr was intentionally misleading the jury. Similarly, de la Torre's counsel had complained of Kerr's late production of the second code-name list.

There is no conclusive way of learning whether Kerr intended to mislead the jury or to otherwise unfairly gain an advantage in the trial. It is self-apparent that Dusek had no fail-safe way of knowing Kerr's state of mind. Fortunately, the Constitution permits free men to draw and voice unpleasant

and even harsh, though possibly mistaken, conclusions about public officials, including those prosecuting drug conspiracies.

Even if Dusek's interpretation was admittedly mistaken, that would not be enough. The Texas Supreme Court, relying on *Pape*, has held that it is not enough for a plaintiff to show that the defendant made a mistake; actual malice is much more than an error in judgment. *Foster v. Upchurch,* 624 S.W.2d at 566.

The record in this case establishes as a matter of law that Dusek not only believed in the truth of his column, but had more than reasonable grounds to do so. Every challenged statement is supported by facts. Dusek's belief that the government "boosted" its cases and that Kerr lied in his summation are reasonable and fully supported. Subjective awareness of probable falsity cannot be found where, as here, the article is supported by a multitude of previous reports and facts upon which the writer reasonably relied. *New York Times Co. v. Sullivan, supra; Rosanova v. Playboy Enterprises, Inc.,* 580 F.2d 859, 862 (5th Cir. 1978). Texas courts have recognized the same rule and enforced it in applying both the former common law standard of actual malice and the *Sullivan* test. *See El Paso Times, Inc. v. Trexler,* 447 S.W.2d 403, 406 (Tex. 1969); *Times-Mirror Co. v. Harden,* 628 S.W.2d 859 (Tex. App.—Eastland 1982, writ ref'd n.r.e.); *International & G.N.R. Co. v. Edmundson,* 222 S.W. 181 (Tex. Comm'n App. 1920, opinion approved); *Mayfield v. Gleichert,* 484 S.W.2d 619 (Tex. Civ. App.—Tyler 1972, no writ). The point is self-apparent since a reasonable belief in the truth of what was said is both logically and legally incompatible with a subjective awareness of falsity.

Given the unrebutted and fully supported testimony of Dusek that he believed the opinions he expressed and the accuracy of his column as a whole, Petitioner has failed to establish actual malice and judgment should be rendered for Respondent.

3. Texas Law Requires Judgment For Respondent

Kerr failed to meet his burden to prove that he suffered any "actual injury" to his reputation proximately caused by the

Respondent's publication. Since this is a libel *per quod* case [7] and Kerr failed to show any injury to his reputation, he is not entitled to any recovery from *The Times*. *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984).

The evidence relating to the issue of injury to reputation and damages in general is summarized at pages 6-8 *supra*. Under both the United States Constitution and Texas law, this evidence is simply insufficient to establish compensable injury to reputation or mental anguish and fails to support the jury's award of actual and exemplary damages, even after remittitur.

The recent Texas cases of *A. H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.), and *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, are dispositive of the issue. *Rayzor* is remarkably analogous to this case, and merits the Court's detailed review. In *Rayzor* the jury awarded the public-figure plaintiff $1,000,000.00 in actual damages and $1,000,000.00 in exemplary damages. The appellate court reversed and rendered holding:

> Appellee offered no substantial evidence, other than his own testimony, of any loss because of embarrassment or humiliation. He expressly admitted that he 'can't name anyone' who thinks less of him because of the articles. He offered no testimony that anyone had told him that he thought the article meant either that Rayzor had threatened to kill or physically harm Carter or Miller or that Rayzor had committed any crime . . . .

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[7] In Texas, publications concerning public officials are treated differently than publications about others in that even vigorous and untrue condemnation of an official is not libelous *per se* unless it charges an offense for which he may be removed from office. *Fitzjarrald v. Panhandle Publishing Co.*, 228 S.W.2d 499 (Tex. 1950); *Hearld-Post Publishing Co. v. Hervey*, 282 S.W.2d 410 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.); *Rawlins v. McKee*, 327 S.W.2d 633 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.). In any event, by submitting the question of whether the article was defamatory, the trial court correctly ruled the article, if libelous, to be only libelous *per quod* at best. *Cotulla v. Kerr*, 74 Tex. 89, 11 S.W. 1058 (1889); *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970). Petitioner failed to show that the alleged accusation of cheating would subject him to removal from his position as a United States Attorney, and under the above authorities this is at best a libel *per quod* case.

> Appellee offered no evidence of financial injury; his assets, which were impressive, increased steadily .... He admitted that he could not point to any actual dollar loss he had suffered because of the articles.
>
> Despite this state of the record, and this lack of proof of actual injury or loss, the jury awarded him $1,000,000 in 'compensatory' damages and $1,000,000 in exemplary damages. The jury was obviously motivated by something more than evidence in this case, because that was lacking. We believe, from the record as a whole, that this massive award of damages is the result of passion and prejudice against newspapers in general and this one in this case in particular. It cannot stand.
>
> * * *
>
> Rayzor offered no evidence of any emotional or physical reaction to the articles, except his self-serving claim that he was 'shocked and stunned' by the August 17, 1979 article. He never consulted either a physician or a professional psychologist or a counselor. Moreover, he offered no evidence of any actual injury to his reputation. In view of this evidence, or lack thereof, we hold that the award of $1,000,000 actual damages is unsupported by competent probative evidence and is beyond all reason. *Razor,* 644 S.W.2d at 85-86.

It is apparent that the plaintiff in *Rayzor* presented the same weak damage testimony as did Kerr and that such evidence is insufficient to support the jury's award of damages. As in *Rayzor,* Kerr failed to produce probative evidence of any actual or compensable injury sustained as a result of the publication. As in *Rayzor,* the jury's award of damages is not supported by probative evidence, and is obviously the result of impermissible "passion and prejudice against newspapers in general" and the *The Times* in particular.

Leyendecker & Associates, Inc. v. Wechter, supra, further establishes the inadequacy of Kerr's damage evidence. There, the Texas Supreme Court held that in cases of libel *per quod* a

plaintiff must prove injury to reputation before he can recover actual damages for mental anguish, etc. In *Leyendecker* an employee of the defendant wrote a letter falsely accusing plaintiffs of submitting fraudulent claims to an insurance company. The jury awarded Mrs. Wechter $1,500.00 in actual damages. The Court reversed the award holding that since the letter was only libelous *per quod,* the plaintiff's failure to prove injury to reputation or special damages as to Mrs. Wechter precluded the award of actual damages. The court stated:

> The only evidence of injury to Mrs. Wechter was the testimony of Mr. Wechter that his wife was "very much upset", "morose" and "depressed". We find that this evidence does not demonstrate injury to Mrs. Wechter's reputation. Therefore, we hold the court of appeals erred in awarding Mrs. Wechter damages for mental anguish from the letter." *Id.,* 683 S.W.2d at 374.

The evidence in *Leyendecker* is essentially identical to the present case. In both *Leyendecker* and the case at bar, the plaintiff proved only her/his state of mind and not the effect on reputation required by Texas law. In the absence of proof of injury to reputation, however, this testimony does not permit an award of damages since, under *Leyendecker,* there has been no proof of injury to reputation. Since Kerr offered no proof of injury to reputation or special damages, under *Leyendecker* judgment must be rendered for the Respondent.[8]

Even in the absence of *Leyendecker* and *Rayzor,* Petitioner's damage proof is inadequate to support any award. The Texas Courts have held defamation plaintiffs to the rigorous constitutional standard of damage proof. In *Ryder Truck Rentals, Inc. v. Latham,* 593 S.W.2d 334 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.), the Court held, relying primarily upon *Gertz* and *Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123, 51 L.Ed.2d 573 (1977), that the jury could not award general or "presumed" damages and that all damage awards must be supported by

[8] During oral argument before the Court of Appeals, counsel for Petitioner admitted under questioning by the Court that there was *no* evidence in the record of injury to Kerr's reputation.

competent evidence. The *Ryder* and *Rayzor* courts held that in order to recover for mental anguish, plaintiff must show more than "mere worry, anxiety, vexation or anger"; rather, the proof must show "intense pain of body or mind, or a high degree of mental suffering". This showing, absent from *Rayzor* and *Ryder,* is obviously lacking in the instant case and those authorities govern.

CONCLUSION

WHEREFORE, Respondent prays that the Petition for Certiorari be denied and that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

SCOTT, HULSE, MARSHALL,
FEUILLE, FINGER & THURMOND
11th Floor
Texas Commerce Bank Building
El Paso, Texas 79901
(915) 533-2493

By:_____
Richard Munzinger

By:_____
Bryan H. Hall

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed to Jerry A. Gibson, Attorney for Petitioner, P.O. Box BH002, San Antonio, Texas 78201, this 18th day of February, 1987.

_____
Richard Munzinger

APPENDIX A

Federal System Less Than Just?

Ron Dusek

Times Staff Writer

(1) The federal trial of Rick de la Torre and Ben Garcia on drug conspiracy charges last week adds poundage to a premature but quickly developing opinion that the federal justice system in El Paso may be less than just.

(2) This opinion has nothing to do with the fact that de la Torre and Garcia were found guilty of one charge in a four-count indictment and innocent of the others.

(3) Controversy was rampant in the federal courthouse about whether the evidence was sufficient to show guilt and even about whether they should have been indicted in the first place. That no longer matters since the jury found them guilty.

(4) But, I'll go with the defense attorneys on their claim that the indictments were an afterthought by the government. They were indicted because all the other indictments (*sic*), charged in the original indictment ran off after being released on bail. The prosecution convicted one man, Fred Bella, and got reams of publicity, but had no one else to take to court after making all that noise about machine guns, nine tons of marijuana and some cocaine.

(5) When the defense attorneys expressed that idea, generally, in court, Assistant U.S. Attorney Jim Kerr protested to the jury in closing arguments with "Do you think the U.S. Attorney has nothing better to do? . . . No other criminals to prosecute?"

(6) Yes, Mr. Kerr, the U.S. Attorney has nothing better to do. There are no cases pending that will draw more publicity. About 98 percent of all criminal cases handled by the local feds are nonviolent crimes involving illegal aliens or pot smugglers. It is debatable whether or not those are

victimless crimes. Top government officials are arguing about whether to give aliens amnesty and to legalize pot. Heroin, bank robbery and murder are another subject.

(7) Kerr appears to have forgotten that U.S. Attorneys and their assistants are political appointees. Their future may depend on whether they can make the "big case" that will get lots of publicity. Political debts are paid by appointments to the U.S. Attorney's office—sometimes in complete disregard for the competency (*sic*) of the person appointed.

(8) There is one assistant U.S. Attorney in El Paso who has not, after nearly a year, handled a case in federal district court. That person has been given only menial tasks to perform and on occasion (*sic*) has not handled them professionally, resulting in obvious frustration for the judges and mocking comments by courthouse employees.

(9) Some courtroom actions in the past have suggested that judges, government attorneys and police are not above boosting their cases against defendants by less than admirable methods.

(10) For example, in two cases in which persons were shot by Border Patrol agents, the persons were charged with assault on the agents. In one of the cases, an alien was running across the river back to Mexico. He never touched the agent before he was shot. In the other case, two youths were running from an undercover Border Patrol van thinking they were being chased by the boyfriends of some of the female objects of their catcalls.

(11) Former local Border Patrol Chief Dale Swancutt admitted the persons were charged, hoping for a conviction, so that the agents could not be sued. In charging the jury, the judge said that fleeing from an agent can be considered assault. The charge was specific. The reasons for running were no defense. In both cases, it seemed as if the jury had no choice but to convict.

(12) Innocence or guilt can depend on the one word in the charges to the jury and whether the judge allows it.

(13) In another case recently, a Drug Enforcement Administration informant on trial for possession of Heroin claimed the DEA asked him to penetrate a smuggling ring. He did. Became part of a deal. Tipped off the DEA. They told him to get out. He didn't because he claimed in court it was too late. He was arrested when the DEA busted the deal.

(14) The defense attorney asked during the trial that the word "coercion" be added in charges to the jury as a defense. The word "entrapment" was already included, but the definition of entrapment didn't really fit what actually happened. The judge said the attorney's request was too late.

(15) The jury wasn't tacky about definitions, and found the man innocent. A man's life could have been crippled because he tripped over a small piece of government red tape—being late.

(16) More examples of the government appearing to boost its case came during the de la Torre-Garcia trial.

(17) In closing arguments, Kerr told the jury that de la Torre admitted to being the money man representing financial backers for drug smuggling.

(18) Kerr lied. De la Torre did not admit to that. An informant testified that de la Torre told him that.

(19) Kerr's job is to present the evidence and kept (*sic*) it straight or to straighten it if it's been confused by the defense. When the evidence is straight, it will speak for itself.

(20) More suspicious action: Weeks before the trial, the prosecution and defense shared evidence. There was a piece of paper with persons' names on it and their alleged code names to be used during the alleged smuggling operation. The piece of paper did not have Garcia's or de la Torre's name on it.

(21) A day and a half before the trial, the prosecution discovered it also had another list with all the same names as the first list plus, at the bottom, the names and codes for Garcia and de la Torre.

(22) Chagra said a day and a half was not enough time for him to have the second list analyzed by a handwriting expert to determine who wrote the list.

(23) In every case, the prosecution sounds off about its burden to prove guilt. The burden is no excuse for cheating.

(24) And the burden isn't that heavy to begin with.

(25) Chagra said to the jury, "In reality, when you read that someone is indicted, you sort of think he's guilty. Because usually where there's smoke there's fire. This courtroom is not a sterile environment" where people are perfectly objective and fair.

(26) It always seems amusing when Judge William Sessions or Judge John Wood tells a jury, after a prosecutor makes an irrelevant, nasty comment, to ignore that comment.

(27) It's hard to believe that the judge really believes the jury is a computer with an erase button . . . and that the words accidentally slipped off the lawyer's tongues.

(28) Here's what takes the cake: What kind of attitude does it suggest?—On the first day of the trial, Wood kept the jury until about 7 p.m.; on the second day, from 8;30 a.m. to about 7 p.m.; on the third day from 9 a.m. to 11 p.m.; and the last day from 7:30 a.m. until they reached a verdict at about 4:30 p.m.

(29) The unannounced reason for such long days for the jury, of which some members were at retirement age: so Judges Wood and Sessions could go fishing together.

APPENDIX B

RECORD REFERENCES

The following table reflects the breakdown of the opinion article of August 6, 1978, entitled "Federal System Less Than Just?", by paragraphs, Nos. 1 through 29, and then gives the Statement of Fact references and exhibit numbers wherein each paragraph is discussed and substantiated in the record of this case.

Paragraph Nos.	Statement of Fact References	Exhibit Nos.
1	95-96, 125-129, 157-158	Def. Exs. 2 and 3 (copies of *The El Paso Times* as it appeared on August 6, 1978)
2	149, 158-159, 475	Def. Ex. 7 (08/4/78 article)
3	96-98, 158-159	
4	98-101, 103, 145-146, 160-168, 229, 237, 410-413, 476-479	Def. Exs. 8 & 9 (Dusek's notes); Def. Exs. 10 & 11 (De la Torre Tr. pp. 1101 & 1107); Def. Ex. 12 (05/10/78 article) Def. Ex. 13 (04/21/78 article)
5-6	101-103, 167, 171-174, 413-415, 479-481	Def. Ex. 15, (Dusek's notes); Def. Ex. 16 (De la Torre Tr. pp. 1143-1145)
7	103-105, 481-485	
8	106-110, 174-176, 248-249, 415-419, 485, 537-538	
9	110, 157, 176-177	
10 & 11	157, 177-187, 188-192, 237-246, 249-253, 485-488	Def. Ex. 17 (01/13/78 article); Def. Ex. 18 (01/04/78 article); Def. Ex. 19 (02/01/78 article)
12-15	157, 192-195, 489-492	
16-19	68, 72-82, 88-91, 195-207, 230, 254-258, 400-406	Def. Ex. 23 (De la Torre Tr. p. 1092); Def. Ex. 24 (De la Torre Tr. p. 1095), Def. Ex. 25 (De la Torre Tr. p. 1131)
20-24	111-120, 207-213, 406-410, 492-496	Def. Ex. 20 (07/22/78 article) Def. Ex. 26 (Dusek's notes); Def. Ex. 27 (Dusek's notes)
25	213-215	Def. Ex. 28 (De la Torre Tr. p. 1114); Def. Ex. 29 (De la Torre Tr. p. 1115)
26 & 27	147-148, 215-216, 258-259	
28	147-150, 198, 216-217, 221-222, 539	
29	217, 259-270, 419-420, 539,541	

No. 86-1192

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1986

JAMES W. KERR, JR., PETITIONER

V.

EL PASO TIMES, INC., RESPONDENT

ON PETITION FOR A WRIT CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

PETITIONER'S REPLY MEMORANDUM

Jerry A. Gibson*
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201
(512) 734-7092

Carrie K. Catalani
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201
(512) 734-7092

ATTORNEYS FOR PETITIONERS
*Counsel of Record

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

I. The Clear and Convincing Evidence at Trial Establshed that The "Cheating" Accusation Was Made with Actual Malice . . 2

II. The Supreme Court Does Not Have Jurisdiction To Rule On Texas Law In This Petition For Writ of Certiorari 10

Conclusion 13

TABLE OF AUTHORITIES

Carson v. Allied News Co.,
529 F. 2d 206,
(7th cir. 1976) 7

Chandler v. Florida, 449 U.S.
560, 101 S.Ct. 802, 66
L.Ed. 2d 740 (1981) 11

Cochran v. Indianapolis Newspaper,
Inc., 372 N.E. 2d 1211
(Ind. 1978) 9

Curtis Publishing Co., v. Butts,
388 U.S. 130, 87 S.Ct.
18, L.Ed. 2d 1094,
rehearing denied, 389 U.S.
889 1975 (1967) 4,8

El Paso Times, Inc., v. Kerr,
706 S.W. 2d 797
(Tex.App. - El Paso 1986,
writ ref'd n.r.e.) 3,6

Goldwater v. Ginzburg, 414 F. 2d
324 (2d cir. 1979),
cert. denied, 396 U.S. 1049,

90 S.Ct. 701, 24 L.Ed. 2d
695, rehearing denied, 397
U.S. 978 (1970) 5,9

International Longshoremen's Assoc.,
A.F.L. - C.I.O. v. Davis,
___ U.S. ___, 106 S.Ct. 1904,
90 L.Ed. 2d 389 (1986) 11

Morrison v. Nissan Motor Co.,
601 F. 2d 139
(4th cir. 1979) 6

New York Times Co., v. Sullivan,
376 U.S. 254, 84 S.Ct. 710, 11
L.Ed. 2d 686 (1964) 4

Sprouse v. Clay Communications, Inc.,
211 S.E. 2d 674
(W.Va. 1975), cert. denied, 423
U.S. 882, 965 S.Ct. 145, 46
L.Ed. 2d 107, rehearing denied,
423 U.S. 991 (1975) 9

St. Amant v. Thompson,
390 U.S. 727, 88 S.Ct.
1323, 20 L.Ed. 2d 262 (1968) . . . 7

Vandenburg v. Newsweek, Inc.,
507 F. 2d 1024
(5th cir. 1975) 7
28 U.S.C.A. §1257 (3) (West 1984) . . . 11

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PETITIONER'S REPLY MEMORANDUM

Respondent, in its opposing brief in No. 86-1192, raises two new questions which were not addressed in Petitioner's Petition for a Writ of Certiorari. Respondent has urged this court to

consider whether or not the newspaper article was published with actual malice and whether Texas law required judgment for Respondent. (Brief In Opposition, p.12-20).

Petitioner presents this Reply Memorandum to respond to the two new arguments. Neither argument is properly brought before this court. The Court of Appeals for the Eighth District of Texas did not consider the sufficiency of the evidence on the issue of actual malice. Even so, the trial court record is filled with clear and convincing evidence of Respondent's actual malice in support of the jury's finding of such. Furthermore, this court does not have jurisdiction to consider whether Texas law was properly applied by a Texas court.

I.

The Clear And Convincing Evidence At Trial Established That The "Cheating"

Accusation Was Made With Actual Malice.

Preliminary, the question regarding sufficient evidence of actual malice is not properly before this court because it was not the basis of the holding in the Court of Appeals for the Eighth District of Texas. See El Paso Times, Inc., v. Kerr, 706 S.W. 2d 797, 798(Tex.App. - El Paso 1986, writ ref'd n.r.e.) (appellant's points of error regarding whether the article was a constitutionally protected expression of opinion were "determinative of this appeal"). The Court of Appeals based its decision only on the constitutional distinction between a statement of fact and a statement of opinion. Thus, Respondent's newly raised question as to actual malice is improper for consideration by this court.

Petitioner recognizes that in order for the article to be actionable, the Respondent must have acted with actual

malice in making the cheating accusation, such that the accusation was made with knowledge of its falsity or was made in reckless disregard of its truth or falsity. New York Times Co., v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). Many pieces of evidence of actual malice, however, were presented to the jury at the trial court level which cumulatively joined together to meet the clear and convincing burden of proof.

Other courts have recognized that cumulative evidence can be clear and convincing proof of actual malice. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 157-59, 87 S.Ct. 1975, 1992-93, 18 L.Ed. 2d 1094, rehearing denied, 389 U.S. 889 (1967) (finding of actual malice affirmed where evidence showed story was not "hot news", story should have been investigated but was not, and independent support for story was not gained);

Goldwater v. Ginzburg, 414 F. 2d 324, 339-40, cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695, rehearing denied, 397 U.S. 978 (1970) (2d cir. 1979) (jury finding of actual malice affirmed where evidence showed story was not "hot news", defendants were aware of possible harm, and only sketchy investigation was done). A brief summary of some of the evidence presented to the jury in the current case shows that the jury's finding of actual malice was supported by clear and convincing evidence.

For example, Ron Dusek the newspaper reporter for the article in question, testifed that he intended the readers to believe that Petitioner (Kerr) had conducted himself unethically during the trial, but that he had no evidence that Kerr had cheated with regard to the handling of the code name list in the de la Torre trial. (S.F. 68, 118-120). The

Appellate Court which heard this case also recognized that "[a]s far as the record before us in concerned, there is no evidence that Kerr either lied or cheated." El Paso Times, Inc., v. Kerr, 706 S.W. 2d at 799. Petitioner urges this court to consider that the jury heard Dusek's testimony and had the opportunity to watch his mannerisms. Proof that Dusek accused Kerr of cheating when Dusek knew it was false depended to some extent "on the credibility of the witness[], which can best be determined by the trier of facts after observation of the demeanor of the witness[] during direct and cross examination." Morrison v. Nissan Motor Co., 601 F. 2d 139, 141 (4th cir. 1979). Respondent told this court that Dusek believed everything he printed was true. (Brief in Opposition, p.12-16). However, this Honorable Court has recognized that:

"[t]he defendant in a defamation

action ... cannot ... automatically insure a favorable verdict by testifing that he published with the belief that the statements were true. The finder of fact must determine whether the publication was indeed may in good faith." St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968).

The evidence also established that **El Paso Times, Inc.,** published the article with reckless disregard for its truth. It was established for the jury that there were no time constraints to publish this article, since it was not a "hot news" item. The jury could fairly consider the absence of time pressure when deciding on the presence of actual malice. See Carson v. Allied News Co., 529 F. 2d 206, 211 (7th cir. 1976); Vandenburg v. Newsweek, Inc., 507 F. 2d 1024, 1026 (5th cir. 1975) ("when the

story is not hot news ... the investigation must be more thorough").

Ed Foster, a former editor for the **El Paso Times** , denied having edited the article even though Dusek testified that the article was placed on Foster's desk for his review. (S.F. 316). Foster testified that he was unaware of anyone inquiring into the accuracy of the article, although the charges in the article were so startling and obviously damaging that he would have initiated a serious inquiry before publication. (S.F. 316, 325).

In addition, the article as a whole evidences that it was a hatchet job on the law enforcement agencies discussed, which is a factor to be considered when determining if the publication was a knowing and reckless falsehood. See e.g. Curtis Publishing Co. v. Butts, 388 U.S. at 169 (defendant had adopted a program of

"sophisicated muckraking designed to provoke people, and make them mad"); Goldwater v. Ginzberg, 414 F. 2d at 342 (evidence of ... motive and intent may help establish actual malice); Cochran v. Indianapolis Newspapers, Inc., 372 N.E. 2d 1211, 1220 (Ind. 1978) (desire to get plaintiff is relevant and is admissible as evidence in determining whether defendant possessed a state of mind highly condusive to reckless disregard of falsity). The Supreme Court of West Virginia agreed with such analysis when it stated:

> "[p]ersonal motives on the part of a newspaper, or participation of a newspaper in a plan or scheme to injure is evidence of recklessness and willful disregard for truth which may be considered along with other evidence on the question of actual malice." Sprouse v. Clay Communications, Inc., 211 S.E. 2d

674, 688 (W. Va. 1975), cert. denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed. 2d 107, rehearing denied, 423 U.S. 991 (1975).

This is only a partial list of the evidence which was presented to the jury at the trial court level on the issue of actual malice. When each of these pieces are added together, Petitioner clearly met his burden of showing by clear and convincing evidence that Respondent published the cheating accusation knowing that it was false or in reckless disregard of its truth or falsity. Thus, no constitutional protections are available.

II.

The Supreme Court Does Not Have Jurisdiction To Rule On Texas Law In This Petition For Writ of Certiorari.

The jurisdiction of the Supreme Court to review a judgment by the highest court of a state by writ of certiorari is

defined in 28 U.S.C.A. §1257 (3) (West 1984). The statute clearly states that the Supreme Court's jurisdiction is limited to questions regarding the "the validity of a treaty or statute of the United States ... or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution". 28 U.S.C.A. §1257 (3) (West 1984).

Respondent's request for the court to consider Texas law on the Petition for Writ of Certiorari is inappropriate. This court has recognized that it does not have the jurisdiction to evaluate a state court's interpretation of state law. See International Longshoremen's Assoc., A.F.L. - C.I.O. v. Davis, __ U.S. __, 106 S.Ct. 1904, 1910, 90 L.Ed. 2d 389 (1986) (Supreme Court has "no authority to review state determinations of purely state law"); Chandler v. Florida, 449 U.S. 560,

569, 101 S.Ct. 802, 807, 66 L.Ed. 2d 740 (1981) ("in reviewing a state-court judgment, [the Supreme Court is] confined to evaluating it in relation to the Federal Constitution").

Regardless of the foregoing, Petitioner asserts that Texas law does not require judgment for Respondent. Petitioner would refer this court to the Brief for Appellee which Petitioner filed in the Court of Appeals for the Eighth District of Texas. The argument and authorities under Appellee's Reply Point No. 3 clearly state that there was factually sufficient evidence of compensable mental anguish and injury to Kerr's reputation. (Brief for Appellee, p.35-48).

The only proper federal question before this court is whether a newspaper article statement which falsely and maliciously accused Petitioner, James

W. Kerr, Jr., of cheating in the prosection of a drug smuggling case was an actionable statement of fact or was a protected expression of opinion. Neither of the new matters which Respondent raised in his Reply Brief were the basis of the decision made by the Court of Appeals for the Eighth District of Texas. They are inappropriate for consideration by this court. The trial court record establishes actual malice by clear and convincing evidence anyway. Furthermore, Respondent's argument regarding Texas law is clearly beyond the jurisdiction of the Supreme Court.

CONCLUSION

For the reasons set forth above, as well as those which have been urged in the Petition, Petitioner respectfully prays that this Petition for Writ of Certiorari should be granted to review the Judgment and Opinion of the Court of Appeals for

the Eighth District of Texas.

Respectfully submitted,

Jerry A. Gibson
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201
Counsel of Record

Carrie K. Catalani
600 Interfirst Fin. Ctr. N.W.
P.O. Box BH002
San Antonio, Texas 78201